THE

LAW REPORTS.

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Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL.

1892.

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The Lord Chancellor, Lord *Halsbury*.
The Duke of *Richmond and Gordon*.
The Marquis of *Ripon*.
Earl of *Selborne*.
Earl *Spencer*.
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Sir *Henry Cotton*.
Sir *Nathaniel Lindley*.
Sir *Charles Bowen*.
Sir *Edward Fry*.
Mr. *Shand* (Lord *Shand*).

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BY ORDER OF THE LIEUTENANT GOVERNOR OF BENGAL * FORWARDED

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

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RAMRATAN SUKAL . . . . . PLAINTIFF; J C.*

AND 1891

MUSSUMAT NANDU AND ANOTHER . . . DEFENDANTS. *Nov* 24

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

Execution of Bond by Hindu Widow—Onus probandi—Finding of Fact by Second Court—Appellate Jurisdiction.

Held, that the *onus* of proving due execution of a bond sued upon lay upon the Plaintiff, who relied upon the signature of a Hindu widow as binding the estate which she represented.

Baboo Kameswar Pershad v. *Run Bahadoor Singh* (Law Rep 8 Ind. Ap. 8) referred to.

A third Court cannot entertain an appeal upon any question as to the soundness of a finding of fact by a second Court, however unsatisfactory such finding, if examined, may be.

APPEAL from a decree of the Judicial Commissioner (Sept. 25, 1888), affirming a decree of the Commissioner of the *Narbudda* Division (March 19, 1888), which reversed a decree of the Extra Assistant Commissioner of *Hoshangabad* (June 6, 1887) in favour of the Appellant.

The decision of the second Court was that the bond sued upon by the Appellant was invalid under sect. 257*a* of the Civil

* *Present*:—LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

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Procedure Code; that at the time of its execution there was no debt due by the deceased in respect of which his widow had power to bind his estate; and that there was no *bonâ fide* execution of the bond by the widow, as it had not been executed by her with a full knowledge of all the circumstances of the case. Under sects. 584, 585, a finding of fact by the second Court could not be disturbed in second appeal.

Doyne, and *C. W. Arathoon*, for the Appellant.

Mayne, for the Respondents, was not called on.

The judgment of their Lordships was delivered by

LORD WATSON:—

This is an action brought by the Appellant in 1886, before the Court of the Deputy Commissioner of *Hoshangabad*, in which he has obtained decree against the Respondents as widows and heirs of *Khushal*, a zemindar, who died in 1878. He was survived by three widows, *Mussumat Deo*, the senior, who died in January, 1881, and the Respondents, *Mussumat Nandu* and *Mussumat Sheo*, who are Defendants in the Court below.

The action was laid upon a bond dated the 7th of November, 1881, which bears to have been granted in favour of the Appellant by *Mussumat Deo*, who at that time was the manager of the estate. Various defences were set up by the Respondents, which it is unnecessary to notice in this appeal. There was no written statement; but the Deputy Commissioner had the pleaders of the parties before him; and after hearing them he settled issues for the trial of the cause, the third issue being: "Was it"—that is the bond sued on—"executed by *Mt. Deo*, patelin? If so, are Defendants two and three"—that is the two Respondents—"liable for the money due on the bond?" Now, it was clearly the duty of the Appellant to prove, in order to make his claim under the bond good against the estate in the hands of the Respondents, that the senior widow duly executed the bond, because it is her intelligent signature, in the capacity of a Hindu widow representing the estate, which alone could give validity to such a document.

The Deputy Commissioner found in favour of the Appellant on the third issue; but the case was taken by appeal to the Court of the Commissioner, *Narbudda* Division, who found on that issue for the Respondents. He intimated an opinion in his judgment, that the case made by the Appellant, to the effect that the widow executed the bond with her own hand, did not stand the test of probability when the evidence was examined; but he did not embody that view in his finding, which was in these terms: "I hold, therefore, that the bond was not executed by *Mt. Deo* with a full knowledge of all the circumstances of the case, and that there was no *bonâ fide* execution as far as *Mt. Deo* is concerned." It appears to their Lordships that the *onus* of proving due execution lay upon the Plaintiff, who relies upon the signature of a Hindu widow as binding the estate which she represented. That point was made the subject of comment by this Committee in the year 1880, in the case of *Baboo Kameswar Pershad* v. *Run Bahadoor Singh* (1).

The case was appealed to the Judicial Commissioner, who expressed an opinion—their Lordships do not think he meant to pronounce any finding—upon this point. He said: "I may add, however, that it appears to me very probable not only that *Mt. Deo* did put her seal to this bond, but also quite understood what she was about." It has now been conclusively settled that the third Court, which was in this case the Court of the Judicial Commissioner, cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court; if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final. If, therefore, the finding of the Commissioner upon the third issue cannot be successfully impeached by the Appellant, his case must necessarily fail.

The argument of the Appellant's counsel satisfied their Lordships that the decision of the third issue one way or another mainly depended upon the credit which ought to be given to oral testimony of a conflicting character; and that the finding of the Commissioner upon that evidence was substantially a finding of fact.

(1) Law Rep. 8 Ind. Ap. 8.

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Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed with costs. The Appellant must pay to the Respondents their costs of this appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*
Solicitor for Respondents: *Thomas Ingle.*

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Nov. 27; *Dec.* 2, 3.

HURRICHURN BOSE . . . . . PLAINTIFF;

AND

MONINDRA NATH GHOSE. . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Evidence—Probabilities—Execution of a Promissory Note.

Case in which it was held on the evidence and a discussion of surrounding probabilities that the First Court was in error in finding that a promissory note sued upon had been executed by the Defendant.

APPEAL from a decree of the High Court (Nov. 29, 1888), which dismissed the Appellant's suit, thereby reversing a decree of the District Judge of the 24-Pergunnahs (Feb. 23, 1887) in favour of the Appellant to the extent of Rs.1500 and costs.

The case turned entirely upon evidence.

Doyne, and *Phillips*, for the Appellant.

C. W. Arathoon, for the Respondent, was not heard.

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Dec. 2, 3.

The judgment of their Lordships was delivered by

LORD MORRIS:—

In this case an action was brought by the Appellant against the Respondent for the recovery of a sum of Rs.10,998. The Respondent appears, at the time that the first of the transactions hereinafter mentioned occurred between him and the Appellant, to have been a young man under age and of a dissipated and rather lawless character. Arriving in *Calcutta*, he obtained an

* *Present*:—LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

introduction to the Appellant for the purpose of obtaining a loan of money from him, and made a promissory note, bearing date the 6th of January, 1882, by which he promised on demand to pay to a payee, not the Appellant, but a nominee of the Appellant, the sum of Rs.5000, with interest at 36 per cent. That note was part of a larger transaction, by which it was intended that he was to get a loan of Rs.15,000, and to secure it by a mortgage. On the same day he entered into an agreement respecting that mortgage; but the mortgage was never executed, and the transaction fell through, except as regards the promissory note above referred to.

A considerable controversy arose before the District Judge and before the High Court as to what amount of money actually passed into the hands of the Respondent in exchange for the note. Both the Courts have concurrently found that only Rs.1500 reached the hands of the Respondent, and that the Respondent was a minor at the time when the note was executed, and their Lordships consider that the ordinary rule as to concurrent findings applies, so that the case must be approached with those as facts assumed.

On the 27th of September, 1883, the Respondent is alleged to have signed a second promissory note, thereby promising to pay to the Appellant or order on demand the sum of Rs.7200, with interest at 18 per cent. The Respondent had come of age before his alleged execution of this note, namely, on the 25th of March, 1883. The Appellant's story, as regards the making of the note, is that he was pressing for his money, and that on the day before the note was executed a Mukhtar and a man named *Russick* attended at his office; that they came there on the part of the Respondent, took an account of what was due in respect of the note of the 6th of January, 1882, and ascertained that there was an amount of Rs.7200 due; that thereupon it was agreed that the Respondent would attend at his office on the following day, and execute a promissory note for Rs.7200, and that the Respondent did attend accordingly and signed the note. The Respondent denied that he executed the note.

The Appellant stated, as their Lordships understand, that there were six persons present on the occasion of the execution

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of the note: himself, two witnesses to the note, *Jagat Narain* and *Bepin Behari*, the Mukhtar, *Russick*, and another person, who it has been proved is dead. Four of these persons have been examined, namely, the Appellant, *Jagat Narain*, *Bepin Behari*, and the Respondent. The Mukhtar was not called, the Appellant's explanation for not calling him being that he did not know who he was; that he knew nothing about him, and that he could not find him. *Russick* he knew extremely well, seeing that he was the person who introduced the transaction to him in the month of January, 1882; he said that he had searched for *Russick*, but had been unable to find him. Therefore, at the outset, there is the observation that the two persons who purported to have acted for the Respondent in the making out of the account on the day before the note was signed are not produced, and the Appellant relies upon his own evidence and that of his two witnesses. These three persons swear that they saw *Monindra* sign the note. He swears he did not sign it. There is a flat contradiction between them. Their Lordships would not be disposed to pay too much attention to the mere denial of the Respondent, because a portion of his evidence was read in which he shewed a facility for telling a lie upon any subject when it was convenient to him to do so. The two witnesses are stated to be persons to some extent dependent upon the Appellant, and whom he was likely to have influence over. He himself, of course, has a large interest in the matter.

That being the outline of the case, the District Judge remarked that, "Though the evidence may shew, perhaps, that *Hurrichurn* is rather difficult in money transactions, there is no reason for assuming him to be a forger," and he grounded that opinion very much upon the inherent improbability of the Appellant committing a forgery when he would run great risk of detection. In the result, he gave the Appellant a partial decree.

The High Court, on appeal, differed with the judgment of the District Judge, and came to the conclusion that the second note was not executed by the Respondent, and their Lordships agree with that conclusion.

It is, in the first place, worthy of notice that the Respondent was a minor at the time of the execution of the first note, and he

therefore, was not liable upon it unless he chose, having come of age in March, 1883, to voluntarily incur a new liability. This is a very unlikely thing for him to have done, seeing that he does not appear to be a person of punctilious honour, who having incurred a liability when he was a minor would feel that it was due to himself to resume it when he came of age. Moreover, he does not seem to have acted without advice, and it is improbable that if he only received Rs.1500 he would voluntarily incur a liability for Rs.7200 with interest at 18 per cent. on a note payable on demand.

It further appears that the Appellant when he got the first note executed took great care to fence it round in such a way that its execution could not be disputed. He got it drawn up by an attorney, he attended at the solicitor's office, and had a direct witness, not a bystander, but a person who pledged himself by the affixing of his signature that he was a witness to the execution of it by the Respondent. He also had it registered after some trouble, and the Respondent was identified before a public officer as being the real person who had executed the note. None of these precautions were taken over the second note, though there is every reason why the Appellant should have considered them at least as necessary in that case as in the case of the first note, if the second note had been in fact executed by the Respondent. With all these improbabilities, which are very ably summed up by the High Court, their Lordships are now called upon to reverse the judgment of the High Court and to say that it has taken a wrong view of the case.

The only novel point which was suggested at the Bar by counsel for the Appellant is with reference to the correspondence, of which neither of the Courts below took any notice. All that the correspondence shews is that in the month of January, 1885, a year and four months after the second note was made, the Appellant wrote a letter to the Respondent, in which he said: "Since the date of the renewal of your note-of-hand you have not paid me a single pie on account of your debt." The word "renewal" would doubtless attract the attention of a business man; but whether it attracted the attention of the Respondent or not it is very difficult to say. The letter did, however, put into motion his cousin, *Upendra Nath Ghose*, a man of business, who,

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two or three months afterwards, went to the Appellant and demanded to see the note for which he was bringing his claim against the Respondent. He said he knew that the Respondent had executed a note, because the Respondent had told him so. He said the Appellant refused to shew him the note. The Appellant himself does not pretend that he did shew it to him. But he adds this to the account given by *Upendra* of the interview, that *Upendra*, purporting to come on behalf of the Respondent, said to him, "The money due to you will soon be paid." This *Upendra* denied, and there is only the statement of the Appellant and of *Upendra* on the subject. It does not, therefore, appear to their Lordships that the correspondence is of any very decided weight on the side of the Appellant, which is probably the reason why it is not referred to by either of the Courts below.

There is one matter which occurs to their Lordships as affecting the Appellant's case, which does not appear to have been noticed in the judgment of the High Court, namely, that *Bepin Behari* and the Appellant did not give at all the same account of the execution of the second note. The Appellant alleged that the account was made up the day before the second note was signed, that it was approved of by the Mukhtar and *Russick* on the Respondent's behalf, and that they undertook to bring him to sign it on the following day. *Bepin Behari*, on the contrary, says that it was he who made up the account, that he made it upon the day on which the note was executed, and that he made it from the Appellant's loan-book. The absence of that loan-book is much commented upon by the High Court. There is no account given why it was not produced. It might have verified one story or the other; but suffice it to say that the Appellant, on whom it lay to produce it, did not do so.

Upon these grounds their Lordships see no reason to disturb the finding of the High Court, and accordingly they will humbly advise Her Majesty that the judgment of the High Court should be affirmed, and this appeal dismissed. The Appellant will pay the costs of the appeal.

Solicitors for Appellant: *Morgan Price & Mewburn.*
Solicitors for Respondent: *T. L. Wilson & Co.*

LACHMI PARSHAD . . . . . PLAINTIFF;

AND

MAHARAJAH NARENDRO KISHORE SINGH BAHADUR . . . . . DEFENDANT.

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Nov. 13, 19.

ON APPEAL FROM THE HIGH COURT FOR THE NORTH-WESTERN PROVINCES.

Evidence—Claim against Estate of deceased Person—Insufficiency of Proof.

Case in which the evidence of a claim against a deceased rajah's estate, founded upon money advanced on a parwana alleged to have been executed by him, was held, overruling the first Court, insufficient to establish the transaction.

APPEAL from a decree of the High Court (May 1, 1880) reversing a decree of the Subordinate Judge of *Benares* (Dec. 10, 1886), and dismissing the Appellant's suit with costs.

The facts of the case, the decision of which turned entirely on a consideration of the evidence, are stated in the judgment of their Lordships.

Graham, Q.C., and *Cowell*, for the Appellant.

Finlay, Q.C., and *Doyne*, for the Respondent, were not heard.

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The judgment of their Lordships was delivered by

LORD MORRIS:—

This is an action brought by a banker, or money-lender, against the heir of the deceased Maharajah, *Rajendro Kishore*, for the recovery of a sum of Rs.12,000, and interest, alleged to have been borrowed from him by the Maharajah shortly before his death. The transaction is said to have occurred on the 28th of November, 1883, and the Maharajah died on the 27th of December following. In an action brought to recover money against an executor, or, as in this case, the heir, of a deceased person, it has always been considered necessary to establish as

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

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reasonably clear a case as the facts will admit of, to guard against the danger of false claims being brought against a person who is dead and thus is not able to come forward and give an account for himself.

The present case depends upon the testimony of two persons, *Beni Misr* and *Sukhdeo*, who detail a transaction which is in many respects of an improbable character, and would in any event require corroboration. *Beni Misr* is the gomashta of the plaintiff. *Sukhdeo* appears to be a broker. He is described, in the judgment of the High Court, as a person who "hangs about the bazaar ready to give his services in any way people may feel disposed to employ him . . . . a sort of tout, willing to mix himself up in any sort of transaction out of which he can obtain some remuneration for his trouble." He says that he was one day accosted by a servant of the Maharajah, named *Dammal Pande*, and requested to raise a loan for the Maharajah. He describes the conversation between himself and *Dammal Pande*, and his going to *Beni Misr*. He relates the terms upon which *Beni Misr* agreed to the loan for the Maharajah, namely, 1 per cent. per mensem, and how *Beni Misr* required that the Maharajah should execute a document upon a hundi or stamped paper. He describes how he went back to *Dammal Pande* and informed him of the terms of the loan, how *Dammal Pande* went inside the house where the Maharajah was, and came back saying that the Maharajah agreed to the terms, and how he got a sum of Rs.9 from *Dammal Pande* to purchase the hundi paper. He says specifically that he purchased the hundi paper "a day before that on which the Maharajah signed the hundi," namely, on the 27th of November, 1883. But the hundi paper has upon it the memorandum of the date of its sale, namely, the 28th of November, 1883, the day upon which the Maharajah is alleged to have signed it. It is, therefore, in the absence of explanation, impossible that he could have bought it on the 27th, seeing that on the face of it it purports to have been issued on the 28th. The evidence of *Sukhdeo*, therefore, at the outset is met by this grave discrepancy, which is not a mere inaccuracy of date, but an inaccuracy which goes to the very root of the transaction which he purports to describe.

The other witness, *Beni Misr*, deposes to the fact of his having accompanied *Sukhdeo* to the house of the Maharajah. There is some want of distinctness as to whether he alleges that he saw the Maharajah sign the parwana or not. He only states that the Maharajah signed it; whereas *Sukhdeo* says that he and *Beni Misr* went into the Maharajah's room, and that the Maharajah signed it. Their Lordships would point to the difference between his having merely said that the thing was done, and his having said that he had seen it done.

The case of the Plaintiff, therefore, who appears to have had no personal dealing whatsoever with the Maharajah in this transaction, and who never saw him, depends altogether on the evidence of *Beni Misr* and *Sukhdeo*, and by their evidence he must stand or fall. There has been no corroboration of any kind of the story of these two witnesses brought forward on the part of the Plaintiff. Indeed, at the trial, and certainly in the argument of counsel on his behalf here, counsel seemed to think that the fact of two men having sworn to the signature of the Maharajah to this instrument establishes the case so completely as to render it almost unnecessary to corroborate it in any particular. Their Lordships cannot concur in that view.

The transaction is open to a good deal of comment, both as regards its inception and the mode in which it was carried out. The Maharajah had persons who were acting for him in the management of his affairs of considerable importance in his household, and it seems unlikely that *Dammal Pande* would have been employed at all by him in the matter. Then there is the significant fact of this large sum of money being raised by him just a month before his death, and with nobody of his household, apparently, brought into privity with it, or knowing anything about it. The discrepancy of date has been already mentioned. There is also a certain decree of difficulty attending the fact that the parwana purports to be drawn at twelve months' date, whereas no application for the money appears to have been made for some months afterwards, at all events to Mr. *Gibbon*, the manager, to whom the Plaintiff ultimately wrote. He alleges in his first letter to Mr. *Gibbon*, of the 30th of March, 1885, that he had previously written for the

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money; but there is no distinct testimony of that. A reply was written to him by Mr. *Gibbon*, requiring to know for what necessary purpose, in what manner, and through whom the money was advanced, and what evidence the Plaintiff had in his possession that it was advanced, seeing that it did not appear from the inquiry and statements of the managers of the private expenses of the Mahajarah that it was drawn by him. To that letter the Plaintiff does not appear to have given any direct answer. He alleged that he was ready to shew the parwana; but he passed by all the other demands made upon him to state the circumstances under which the money was advanced. Possibly, as stated by counsel for the Plaintiff, parties in *India*, when a dispute on such a matter has arisen, may be chary of shewing their hand, and although they have an honest case may wish to state as little as they can when they see that their claim is going to be resisted.

The parwana purports to declare that a thing had been done which in reality was only going to be done; because it says: "As you have paid Rs.12,000 to *Mussammat Sarab Mangla*, according to my permission, this money is due to you from me; and so I declare it in writing that I shall pay to you the principal amount, together with interest at 1 per cent. per mensem, within a year, and take back this parwana"—whereas in any case the money had not been paid at that time. The explanation given is that the parwana was entrusted by the Maharajah to one of his own servants, to be deposited with *Sarab Mangla*, and that she was not to hand it over until she had actually got the money.

In addition to her handing over the parwana the Plaintiff appears to have required from her a receipt for the money, which has been relied upon by him as being a document of the last importance. It is in the following terms: "I, *Sarab Mangla*, do declare that according to a parwana of the Maharajah of *Bettiah* . . . . , with a direction for payment of money to me, I have received the sum of Rs.12,000 in a lump sum from them through *Sukhdeo*, *Girdhar Das*, and *Beni Misr*, and there is now nothing due. I have, therefore, granted this receipt in order that it may be of use when needed."

That document, as well as the parwana itself, is impeached as a forgery. As regards the parwana itself, there is the evidence in favour of it, as has been already observed, of *Beni Misr* and *Sukhdeo*. As against it, there is the evidence of three witnesses on the question of handwriting, namely, Mr. *Gibbon*, an Englishman, who was the manager of the Maharajah; *Madho Narain*, his paymaster; and *Har Pershad*, his office-keeper. These three witnesses all depose that the signature to the parwana is not in the handwriting of the Maharajah. *Sarab Mangla* deposes that she never got the Rs.12,000, and that the receipt referred to does not bear her signature.

If these documents were forgeries it does not follow that the Plaintiff is involved in them. He may have given his money, and upon the evidence it would appear that he did give his money to *Beni Misr*, to be handed over to the Maharajah. He may have been misled by *Beni Misr*, and *Beni Misr* and *Sukhdeo* may have been in a conspiracy to obtain the money for themselves, and the money may have gone from the coffers of the Plaintiff, and still never have reached *Sarab Mangla*, whom the Maharajah is said to have expressly ordered to receive it. It therefore does not appear to their Lordships that it is at all necessary to hold, nor that there is evidence in the case which would lead to the conclusion, that the Plaintiff was in any way a party or privy to such a transaction.

It should never be forgotten that the *onus* of proof in this case lies upon the Plaintiff. It is for him to satisfy their Lordships that he has established a reasonably clear case. But he has failed to bring forward the evidence which he ought to have done, when he knew that this transaction was called in question and that the parwana and the receipt were impeached as forgeries. There are no less than five persons who ought to have been called in support of his case, but were not. The first person was the Plaintiff himself, although, as their Lordships have already said, there is no evidence establishing that he was party to this attempt to fix an untrue liability upon the heir of the Maharajah. It would have been better, to say the least of it, if he had come forward and described the transaction so far, at all events, as he was able. But he did not come forward.

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The second witness, whose evidence would have been of the last importance, was *Dammal Pande*, for he appears, according to *Sukhdeo's* testimony, to have been the person who initiated the transaction by going to *Sukhdeo*, and saying that he had been asked by the Maharajah to obtain the Rs.12,000. But *Dammal Pande* was not produced. The third missing witness was *Bhagauti Parshad*. He is said by *Sukhdeo* to have written the receipt, to have taken it to *Sarab Mangla* for her signature, to have obtained her signature to it, and to have given it with the parwana to *Beni Misr*. His evidence would have been most material. But he was not called. The absence of *Girdhar Das* is still more extraordinary. He is named in the receipt as being one of the three persons who paid over the money to *Sarab Mangla*, the other two being *Beni Misr* and *Sukhdeo*. Yet he was not called. Neither has there been any attempt to identify the muharrir, to whom no name has been given, who was alleged to have written the parwana itself. It was suggested that he was the same person as *Bhagauti Parshad*, who wrote the receipt. But no evidence has been given that this was so.

Thus, all the probabilities of the case are against the Plaintiff. The evidence of the handwriting is distinctly against him, and he has in no way corroborated, as he might have done, the testimony of *Beni Misr* and *Sukhdeo*. Neither has any trace been found in the books of the Maharajah of any loan of this sort. To this counsel for the Plaintiff replied that, it being a loan to this lady, who was his mistress, it was not a transaction that would be likely to appear in the Maharajah's books. But the fact nevertheless remains, that no trace of it can be found there.

It appears to their Lordships that the decision arrived at by the High Court on appeal from the sub-Judge of *Benares* is right; and they will humbly advise Her Majesty to affirm the decree of the High Court, and dismiss this appeal. The Appellant must pay the costs of the appeal.

Solicitors for Appellant: *Ranken Ford, Ford, & Chester.*
Solicitors for Respondent: *T. L. Wilson & Co.*

KHOO KWAT SIEW AND OTHERS . . . PLAINTIFFS;

AND

WOOI TAIK HWAT AND OTHERS. . . . DEFENDANTS.

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Nov. 12, 13.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Law of Bankruptcy—Mortgage of all the Bankrupt's Assets—Sufficiency of Consideration—Reconstitution of Bankrupt's Firm after the Assignment.

Where a trading firm assigned all its assets for the time being as security for its debts, receiving a substantial simultaneous advance and a promise of future advances, *held*, that such a mortgage was valid against the firm's assignee in insolvency:—

Where such trading firm subsequently to the assignment was reconstituted, new partners being introduced with the mortgagees' assent, the arrangement being that the assets of the new firm should continue as security, a new payment being made to it or for its benefit by the mortgagees:—

Held, that the said assignment continued to operate both as regards the new partners, and also as regards the assets for the time being of the new firm.

APPEAL from a decree of the Recorder's Court (24th of April, 1890), dismissing the Appellants' suit with costs.

The Appellants are members of the firm of *Chin Hoe & Co.* Some of the Respondents were prior to and on the 11th of March, 1889, partners in the firm of *Pinthong & Friends*; others became partners therein in May of that year. The Official Assignee, as the assignee of the estate and effects of the Respondents' firm, was added as a Defendant.

The object of the suit was to obtain possession of the stock-in-trade, property, and book debts of the Respondents' firm, under a mortgage dated the 11th of March, 1889, and a subsequent agreement of the 29th of May of that year. The defence was that the Appellants' mortgage related to the effects of the firm as constituted at the date thereof, but did not extend to the assets of the new firm after the change in May, 1889; that when the mortgage was executed the Appellants agreed to advance a lakh of rupees if required, and, when the new partners joined, agreed to prolong their accommodation for the balance of Rs.40,000 then due from

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

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the firm, but that they refused to carry out such last-mentioned agreement, and were, therefore, not entitled to possession as prayed. The Recorder held that there was no agreement to make further advances on the mortgage of the 11th of March; that the deed in question assigned substantially all the property of the firm; that it was given to secure a past debt only, and not a past debt and future advances; that it necessarily delayed the other creditors, and withdrew the property of the firm from the legal process which the other creditors had a right to enforce against it; and that it was, therefore, void against the Official Assignee, on the authority of *Lindon* v. *Sharp* (1), and *Ex parte King* (2), and other cases.

Asquith, Q.C., and *Mellor*, for the Appellants, contended that the Recorder's judgment proceeded upon a ground not made in the pleadings, and inconsistent therewith, and as to which no issue had been raised. The mortgage of the 11th of March, 1889, was given to secure not only past, but also present and future advances. With regard to the advance made simultaneously with the mortgage, it was substantial in amount, and was made with the intention of assisting the mortgagors to carry on their business, and in the belief that it would do so. The mortgage was not given or taken in anticipation of insolvency. There was no evidence that it included the whole or substantially the whole of the mortgagors' assets, and the Recorder was in error in holding that there was no agreement for further advances. With regard to the transaction of reconstituting the mortgagors' firm on the 29th of May, 1889, the incoming partners took over the liability of the old firm of *Pinthong & Co.* to the Appellants. They also must be taken to have agreed with the Appellants, for good and valuable consideration, that the assets of the new firm should continue as security for such liability, according to the terms of the mortgage of the 11th of March, 1889. Even if the assets of the new firm as such did not become subject to the Appellants' security, still the assets of the old firm in the hands of the incoming partners remained subject to the mortgage. The new partners joined the firm and took on the assets with

(1) 6 M. & G. 795. (2) 2 Ch. D. 262.

notice of the mortgage of the 11th of March, and subject to the Appellants' rights thereunder. At least, therefore, an inquiry should have been directed as to what portion of the firm's assets at the date of suit were assets included in the Appellants' mortgage, and the Appellants should at least have had a decree in their favour to that extent.

Mayne, and *Foote*, for the Respondent, the Official Assignee, contended that the Recorder's judgment was right. The mortgage of the 11th of March was an assignment substantially of all the property of the firm for a past debt. There was no real *bonâ fide* agreement either expressed in the assignment or prior to or collateral with it to make further advances or give security for the firm. No such advances were in fact made, and no such security was ever given. There was no *bonâ fide* intention to give and take assistance in the further prosecution of the business of the firm. [Reference was made to *Ex parte Johnson* (1), *Ex parte Wilkinson* (2), and *Tailby* v. *Official Receiver* (3).] And even supposing that there had been a *bonâ fide* verbal agreement at the date of the mortgage either to make further advances or to give security, still the effect of the arrangement made on the 29th of May, when the new partners were admitted, was to rescind and determine such agreement, and to render the mortgage of the 11th of March void as against creditors as and from that date. If the incoming partners had on the 29th of May executed a deed to the effect of that dated the 11th of March, it would have been void as given for a past debt or pre-existing obligation. There was no new obligation on the part of the mortgagees created at that date. The debts at that date at least were pre-existing. The mortgage could not operate as regards stock in trade brought in after that date, nor is there any intention proved that the mortgage of March should operate on any future stock. Under these circumstances, it was established that the execution of the mortgage was an act of bankruptcy and a fraudulent preference, and accordingly the suit was rightly dismissed. [Reference was made to *Ex parte Dann* (4).]

(1) 26 Ch. D. 338, 346.
(2) 22 Ch. D. 791.
(3) 13 App. Cas. 523.
(4) 17 Ch. D. 26.

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Mellor, replied.

1891. Nov. 13. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The only question in this case is whether the mortgage deed of the 11th of March, 1889, either originally, or as modified in May, 1889, is valid against the assignee in insolvency of the mortgagors. It is better not to use the term "fraudulent" in such a case, though that term has, by rather an unhappy use of language, been applied by Courts of Equity to transactions which are not at all dishonest in their nature, but are only such as the law will not allow. In this case there is no suggestion from beginning to end of there being anything dishonest in the transaction. The sole question is as to its legal validity.

The well-known rule of law is, that if a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment *in futuro*, that is an act of bankruptcy, and is void against the creditors and the assignee simply because nothing is left with which to carry on his business; whereas if he receives substantial assistance something is left to carry on the business.

Prior to the mortgage of the 11th of March, 1889, the mortgagees had assisted the mortgagors, either by payments or by incurring liabilities on promissory notes for them, to the extent of Rs.30,000. At the time of the mortgage more assistance was given. Their Lordships take it to be clear beyond dispute, though it has been argued to the contrary at the Bar, that simultaneously with the mortgage the Defendants' firm did receive, in the form of a joint promissory note signed by themselves and by the Plaintiffs, further assistance to the extent of Rs.25,000. They also received an undertaking for further accommodation, amounting in the whole to a lakh of rupees. This promissory note, like at least one, if not more, of the former ones, was payable on demand; but there seems to have been some understanding—it does not appear exactly what—that it should not be presented until some later date. It was, in fact,

presented in the month of September, 1889. It was not taken up by the mortgagors, and it was taken up by the mortgagees. There was, therefore, substantially an advance of Rs.25,000 simultaneously with the mortgage. The further accommodation to the extent of a lakh of rupees was not made, on account of a subsequent agreement which will be noticed presently.

That being so, their Lordships consider that this deed must be held to be valid. They are not aware of any case in which, a simultaneous advance of a large amount being made and future support being promised of a large amount, the validity of such a deed has been seriously called in question. In this case the simultaneous advance was nearly as much as the pre-existing debt, and the undertaking to give future advances was considerably more.

It has been argued for the assignee that the proper test is, whether it was the intention of the parties that the trader giving such a security should carry on his business. Their Lordships conceive that that question hardly arises except in those cases where the amount of additional assistance given at the time of the mortgage is so small as to create a doubt whether it is substantial; and then comes in the inquiry into the motives of the parties, whether they did really intend that the business should be carried on or not. It is impossible to raise such a question here, where the amount of simultaneous and future advance is very large. Even if their Lordships did enter into that question, which is one of honesty, the receiver's accounts shew that the firm was, as late as the 31st of August, 1889—in fact, till the large amounts due on promissory notes were called for—a solvent firm. Striking out from the liabilities the debts due to the partners themselves, which, of course, cannot be taken into account for this purpose, and the sum of Rs.40,000, which was due to or was to be supplied by the mortgagees, it seems that at that date the firm would have had a surplus of something like Rs.74,000. It was a solvent firm, and we have it in evidence that it was doing a large business, and it must have been the interest, and doubtless was the motive, of all the parties to keep on its legs a firm that was doing a business bringing in profit.

Their Lordships have no doubt whatever about the validity of

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the mortgage deed of the 11th of March, 1889. That would, at all events, cover such assets of the then firm as were in existence at the time of the insolvency; and the receiver's accounts again shew that those assets were something substantial.

But then it is argued that as regards the partners who came into the firm on the 29th of May, 1889, and as regards the new stock-in-trade which was brought into the business after that time, the mortgage deed cannot operate. First, it was said that there was no arrangement that it should operate on the future stock. But their Lordships consider it to be well established by the evidence that the arrangements made were of the nature which has been succinctly stated by witnesses on both sides. The principal Plaintiff says: "I said that if an agreement was made"—that is, the agreement for incoming partners—"they would have to pay Rs.15,000"—that was paid down—"and Rs.40,000 on due date." Then he says: "It was secured by the document." What was secured? The sum of Rs.40,000 was secured. But this sum certainly would not have been secured if the goods of the old firm, which were being exhausted week by week, had been the only security for it, and the goods substituted for them were not to form part of that security. The same witness afterwards says: "When the incoming partners came into the firm it was understood that I should continue to guarantee the Rs.40,000 until *Bugwan Doss* and the *Chetty's* notes became due." And one of the outgoing partners says, speaking of the incoming partners: "They undertook to pay all debts contracted by the firm"—that is, the old firm—"as well as what was due under the mortgage. The security of the mortgage was to continue, but no further advances were to be made. . . . . It was also said that the amount due on Exhibit A was to be reduced to Rs.40,000, and that there was to be no more accommodation, and the Rs.40,000 was to be paid on due date or on demand. The stock was to continue as security."

On those passages it was argued that that merely meant that the mortgage of the 11th of March, 1889, was to continue according to its legal operation as it was made—that is, its operation on the assets of the old firm. But such an interpretation would be making the parties enter into a nonsensical

agreement. It is impossible to suppose that the incoming partners, who were to take all the benefit and the profits of the existing stock, the mortgagees not enforcing their security against it which they could enforce, were not agreeing under these expressions, if those were the expressions used, or that the witnesses did not intend to state that they were agreeing, that the stock for the time being of the firm then constituted was to be the security to the mortgagees. An incoming partner, and one of the Defendants, *Khoo Cheng Choon*, says: "I said"—to *Khoo Kwat Siew*—"I would pay Rs.15,000"—that was done—"and for the balance Rs.40,000 you must stand guarantee. He agreed. If he hadn't done so I wouldn't have entered into the firm." Therefore, it seems that the incoming partner entered into the firm on the promise of the Plaintiff, *Khoo Kwat Siew*, to guarantee these Rs.40,000, which actually were paid. This statement of *Khoo Cheng Choon* leads to the same inference in the minds of their Lordships that they have drawn from the preceding evidence. In his cross-examination *Khoo Cheng Choon* says: "When *Taik Hwat*"—the senior partner—"went out it was arranged that the security should continue." Their Lordships interpret the meaning of this to be that the security should continue with respect to the new firm and the new stock, exactly as it stood with respect to the old firm and the old stock.

Then it is argued by Mr. *Mayne*, that if this new arrangement had been the first arrangement, and if we take the facts as they stood at the time when the new arrangement was made, all the debts then secured were past debts or existing liabilities, and so the security, the mortgage, would fall within the rule which makes void assignments of all a trader's property. It is an ingenious argument; but their Lordships cannot accede to it. In the first place, it is impossible to take the case as if the original arrangement did not exist. We find a valid mortgage existing over the assets of the firm, immediately before the arrangement of May, 1889. New partners then come in, and the mortgagees' assent has to be obtained, because they could seriously embarrass, probably could break up the firm at any moment. The new partners then have the benefit of the going concern,

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and they make the reasonable arrangement that the going new concern shall be under the same liabilities to the secured creditors as the going old concern. It is impossible to say that such an arrangement as that would invalidate the prior valid security, because it amounts to a mere substitution of persons and goods at the time of the change. But, further, it is not true that substantial consideration in payment did not pass to the incoming partners. It is true that Rs.15,000 of the debt was then paid off, and that the obligation of the mortgagees to provide accommodation up to a lakh of rupees was then remitted; but there still remained their obligation to provide the Rs.40,000, which was actually provided in the succeeding month of September.

This obligation did not exist as between the mortgagees and the incoming partners till the arrangement of May, 1889, was made. Then the incoming partners got the benefit of the suretyship into which the mortgagees had entered for the former partnership.

Their Lordships, therefore, hold that, even if this had been the original arrangement, it would have been supported by the passing of a substantial consideration to the incoming partners at the time of the arrangement.

The result will be that the decree of the Recorder of Rangoon should be reversed, and that the Plaintiffs should have a decree substantially in accordance with the plaint. Probably the property has undergone change during the progress of the suit in a way to vary the precise mode of relief. It will be right to declare that the indenture of the 11th of March, 1889, is a lawful and valid instrument, and that by virtue thereof the Plaintiffs were, at the date of the insolvency of *Pinthong & Friends*, mortgagees of all the stock-in-trade, fixtures, utensils, and effects then upon, or in, or appertaining to their premises in *Merchant Street*, and of the goodwill of their business, with all book debts and trade outstandings then payable to, or recoverable by, the said firm.

There is some further care required in framing the decree, because the suit was originally brought, and this appeal is brought, against all of the seven persons who, between the 11th of March, 1889, and the date of suit, viz., the 11th of September.

1889, were partners in the firm of *Pinthong & Friends*. None of those persons have appeared here, and their Lordships must act in their absence. Three of these persons, *Khoo Bean Poot*, *Khoo Hock Chie*, and *Khoo Jinn Inn*, do not appear to have made any defence, or to have caused or incurred any costs. The effect of the arrangement of May, 1889, was to transfer the liability created by the mortgage of March from the then outgoing partners to the incoming ones. The outgoing partners are the three Defendants in question. Against them there should be no costs. The other four, *Wooi Taik Hwat*, *Khoo Cheng Choon*, *Saw Pong Lim*, and *Khoo Cheng Wah*, put in a written statement denying the validity of the mortgage. In March, 1890, the Official Assignee under the insolvency was added as a Defendant, and, though the individual has been changed, the Official Assignee is a party to this appeal, and has appeared to maintain the Recorder's decree. Whether a decree against the insolvents will be of any value to the Plaintiffs their Lordships cannot tell; but they think that the Plaintiffs are entitled to it. All the remedies that the mortgage deed is calculated to give them they are entitled to against the persons who undertook the obligations, and against the Official Assignee on whom the mortgage property has devolved. The four Defendants last mentioned and the present Official Assignee should be ordered to pay the costs of the suit and of this appeal.

Their Lordships will humbly advise Her Majesty accordingly.

Solicitors for the Appellants: *Bramall & White.*
Solicitors for the Respondent: *Prior, Church, & Adams.*

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AGA AHMED ISPAHANY . . . . . PLAINTIFF;

AND

JUDITH EMMA CRISP . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Promissory Note—Right of Indorser who pays to Transfer of Securities.

An indorser of a promissory note who pays the holder of it is entitled to the benefit of the securities given by the maker of it which the holder has in his hands at the time of the payment and upon which he has no claim except for the note itself.

Duncan, Fox & Co. v. *North and South Wales Bank* (6 App. Cas. 1) followed:—

Held, further, on the evidence in this case, that the owner of the securities had authorized their transfer by the holder to the Appellant on receiving payment.

APPEAL from a decree of the Recorder (May 29, 1890), which dismissed the action so far as it was brought against the above-named Respondent.

The action was brought to recover the sum of Rs.15,108 12*a.* due upon an equitable mortgage, and the Appellant further prayed for a declaration that he was entitled to a charge or lien upon certain property situate in *Phayre Street, Rangoon*, belonging to the Respondent, in respect of the amount that might be decreed in the suit; and, further, for an order that in default of payment the property might be sold; or in the alternative, that the Respondent might be ordered to execute and register a legal mortgage thereof in favour of the Plaintiff.

The facts are stated in the judgment of their Lordships.

The material part of the Recorder's judgment is as follows:—

"From the evidence it is, I think, clear that the first Defendant" (*i.e.* the above-named Respondent) "knew that her deeds had been pledged to the bank, and that she assented to the pledge. But she denies that she assented to them being pledged to the Plaintiff. The second Defendant also

* *Present*:—LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

says that his mother did not know of the transaction. But of course I cannot act upon the evidence of a man who must either have committed a fraud by depositing the deeds without authority, or, if he had authority, must have perjured himself by swearing that he had not. I can only, therefore, act upon the evidence of the first Defendant. It is of a very unsatisfactory character, for she contradicted herself repeatedly, and as it was taken upon commission I had no opportunity of observing her demeanour. As it stands, however, I do not think I should be justified in holding that she was aware of the transactions of the 2nd of August. Fraud may be condoned, or so acquiesced in, that a party is barred from his relief. But such party must have full knowledge of all the facts in order to condone the fraud: *Moxon* v. *Payne* (1). I do not think that such knowledge is brought home to the first Defendant by the evidence in this case. The Plaintiff knew that the property was the property of the first Defendant, and that it was being pledged to secure, not her debt, but the debt of the second Defendant. Yet, having this knowledge, he did not take the precaution of ascertaining whether the first Defendant assented to the acts of the second Defendant, not acting as her agent, but dealing with her property for his own purpose. If a man encounters a loss from the defective authority of the agent, it is properly attributable to his own fault, since he must know that he has no other security than his reliance upon the good faith and credit of the agent: *Attwood* v. *Munnings* (2). Sect. 141 of the *Contract Act*, which was relied upon for the Plaintiff, does not seem to me to apply to this case, as there was a new arrangement under which the Plaintiff became the creditor. I think, therefore, that the suit must be dismissed as against the first Defendant, but without costs, as she is to blame for not taking steps to cancel the power and recover the deeds. There will be a decree against the second Defendant for the amount claimed, with costs."

Mayne and *Fox*, for the Appellant, contended that the decree should have been made as prayed against the Respondent. The

(1) Law Rep. 8 Ch. Ap. 881. (2) 7 B. & C. 283.

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other Defendant acted throughout within the scope of his authority as agent for the Respondent and of the powers conferred upon him by the power of attorney which she had executed in his favour. The evidence justified the Recorder's finding that before the deeds had been redeemed from the bank the Respondent knew that they had been pledged to the bank, and that she had assented to and ratified such pledge. She also assented to and ratified the other Defendant's execution of the promissory notes in her name, and his application to his own use of their proceeds. The Appellant, when he paid to the *National Bank* the loan of Rs.15,000 for which he was surety, became entitled to the benefit of all the securities for the loan which were then in the possession of the bank.

Neville, Q.C., and *Y. Anderson*, for the Respondent, contended that the Recorder was right in dismissing the action as regards her. The loan was not in any degree for the Respondent's benefit, as the Appellant knew, while it was for the benefit of the Appellant, who, the evidence shewed, shared certain joint liabilities with the other Defendant. It was contended that that Defendant had no authority under the power of attorney to pledge or mortgage the Respondent's title deeds, or to execute promissory notes on her behalf. The *National Bank* could not have retained the deeds against her, and still less could it transfer them to the Appellant. Before taking them in deposit, the bank should have made due inquiry as to the authority of the other Defendant to pledge them. The Appellant, too, knowing the deeds to be the property of the Respondent, ought to have made inquiry as to the Defendant's actual authority and his right to deposit the deeds as security for his own debt. The evidence shewed that the Respondent never was aware of the loan or deposit of deeds, and never ratified the same or acquiesced in the acts of the other Defendant. Reference was made to *Polak* v. *Everett* (1).

The counsel for the Appellant were not heard in reply.

(1) 1 Q. B. D. 669.

1891. Dec. 5. The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit in this case was brought by the Appellant against the Respondent and *James F. Crisp*, her son, for Rs.15,000, and Rs.108 12*a*. for interest thereon, and for a declaration that the Plaintiff is entitled to a charge or lien upon the property mentioned in the plaint for or in respect of the amount that might be decreed in the suit; and also for a sale of the premises equitably mortgaged, in the event of the Defendants failing to pay the amount decreed. On the 12th of December, 1888, the Respondent, Mrs. *Crisp*, executed a general power of attorney, by which she constituted and appointed her son, *J. F. Crisp*, her attorney and agent. The only parts of the power of attorney which it is necessary to state are the following passages: "And also to buy sell mortgage let and lease as the case may be any houses or lands and to borrow and take loans of money in my name upon such terms and conditions as he shall think proper . . . . and generally to act for me in all matters and things touching or concerning all or any of my affairs as fully and effectually to all intents and purposes as if I were acting therein in person." It was in evidence that Mrs. *Crisp* had two or three times before April, 1889, lent her son money on his promissory note. About the end of April, 1889, *J. F. Crisp* asked the manager of the *National Bank of India* if he would advance money on his property. *Crisp* said it was his mother's, and that he had power to deal with it. The manager said he would make the advance if *Crisp* would give him a good name. *Crisp* then brought to the manager two joint and several promissory notes, one for Rs.10,000 and the other for Rs.5000, both dated the 30th of April, 1889, payable three months after date to the Appellant or order, signed "*J. F. Crisp*" and "p. p. *J. E. Crisp, J. F. Crisp.*" The manager said he must have the title deeds as well; and *J. F. Crisp* on the same day deposited with the manager the title deeds of landed property in *Phayre Street, Rangoon*, belonging to Mrs. *Crisp*, being the property mentioned in the plaint, and the notes were discounted. *J. F. Crisp* had not

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asked his mother's consent to the deposit; but in the evidence she gave in the suit it appeared that, about the time of the loan, he told her that he had signed two promissory notes for his own use in her name, and that to secure the amount borrowed he had pledged her deeds to the bank, and to that she made no objection; and it is clear that she assented to the deposit with the bank; but she said she objected to her son pledging the deeds with the Appellant. The notes become due on the 2nd of August, and on that day *J. F. Crisp* wrote to the Appellant the following letter:—

"*Rangoon*, 2nd August, 1889.

"Dear Sir,

"In consideration of your paying this day the Rs.15,000 due to the *National Bank of India, Limited*, I hereby agree to your keeping the papers of the *Phayre Street* property with you as security, and that I will have the same settled within three months from date, and pay you interest at 9 per cent. per annum."

Upon receiving this letter the Appellant wrote a cheque for Rs.15,000 in favour of the bank, and sent it to *Crisp*, who took it to the bank, and was told by the head clerk that they would deliver the documents after the cheque, which was on another bank, had been passed. The next day, the 3rd of August, the title deeds were delivered to *Crisp's* man. The head clerk said in his evidence that he thought the man was the Appellant, and it may be inferred that it was intended to deliver the deeds to him. The Appellant afterwards applied to the bank for the deeds, and was told they had been delivered to *Crisp's* man. On the 5th of August *Crisp* wrote to the Appellant, "I am sorry to say that my mother objects to keep her papers with you pending the settlement of accounts existing between you and me," and the deeds remained in *Crisp's* hands.

The learned Recorder of *Rangoon*, from whose decision this appeal is brought, made a decree against *J. F. Crisp* for the amount claimed; but as to Mrs. *Crisp*, he held that, though she assented to the pledge to the bank, she did not assent to the deeds being pledged with the Appellant, and he dismissed the suit as against her.

It is a rule of equity that if the indorser of a bill of exchange pays the holder of it he is entitled to the benefit of the securities given by the acceptor which the holder has in his hands at the time of the payment, and upon which he has no claim except for the bill itself: *Duncan, Fox & Co.* v. *North and South Wales Bank* (1). The same rule is applicable to the indorser of a promissory note. It is possible that there may be circumstances which would create an exception to this rule; but this case is not one. Therefore the Appellant, when he paid the Rs.15,000 to the Bank, became entitled to the benefit of the deposit of the title deeds. No further assent by Mrs. *Crisp* was necessary to entitle him to it. But although, in his plaint, he stated the fact of the deposit with the bank as a security for the repayment of the loan, he did not rest his claim upon this equity. He founded it upon the letter of the 2nd of August, alleging that he agreed to the proposal in that letter, and gave the cheque for Rs.15,000. In their Lordships' opinion Mrs. *Crisp* was bound by that letter, although she did not personally assent to the Appellant keeping the title deeds as security. When the notes became due the bank might have sued her upon them, and have also taken proceedings to have the mortgaged property sold. The letter of the 2nd of August was intended to prevent this, and the arrangement for continuing the security in consideration of getting three months' additional credit was, in the opinion of their Lordships, within the general authority given to *J. F. Crisp* by the words of the power of attorney before quoted, "and generally to act for me, &c." Their Lordships are, therefore, of opinion that on both grounds the decree is erroneous in dismissing the suit as against Mrs. *Crisp*, and they will humbly advise Her Majesty to reverse it, and to make a decree against both Defendants according to the prayer in the plaint, with costs. The Respondent will pay the costs of this appeal.

Solicitors for Appellant: *Hopgood & Dowson.*
Solicitor for Respondent: *B. R. Heaton.*

(1) 6 App. Cas. 1.

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Nov. 10;
Dec. 12.

BEHARI LAL (AND SINCE HIS DEATH), MAINA DAI GYAWALIN . . . . . } PLAINTIFF;

AND

MADHO LAL AHIR GYAWAL AND ANOTHER DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Ikrarnamah by Hindu Widow in favour of Reversionary Heir—Rights of Reversioners.

Where a Hindu widow executed an ikrarnamah in favour of her daughter's son, then the apparent reversionary heir, in which she transferred to him the management of her husband's property, but did not surrender her widow's estate therein:—

Held, as regards the immoveable property sued for, that such daughter's son could not after the widow's death maintain title in exclusion of another daughter's son, born after the date of the ikrarnamah, who at the death of the widow became entitled as one of her husband's reversionary heirs. According to Hindu law, in order to accelerate the estate of the reversionary heir, a widow must convey to him her estate absolutely.

APPEAL from a decree of the High Court (Aug. 12, 1886), reversing a decree of the Subordinate Judge of *Gya* (Dec. 23, 1884), and dismissing the Appellant's suit.

The facts of the case and the ikrarnamah, the subject of the suit, are sufficiently set out in the judgment of their Lordships.

Graham, Q.C., and *Branson*, for the Appellant, contended that the Subordinate Judge was right in holding that the effect of the ikrarnamah was that the widow transferred to the Appellant her proprietary rights, thereby making him absolute proprietor of her husband's estate although she continued to retain the possession. Reference was made to *Noferdoss Roy* v. *Modhu Soondari Burmonia* (1).

Doyne, for the Respondents, was not heard.

* *Present*:—LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

(1) Ind. L. R. 5 Calc. 732.

1891. Dec. 12. The judgment of their Lordships was delivered by

LORD MORRIS:—

Damodur Mahton was the owner of the immoveable property, the subject of this suit; he died in the year 1845, leaving his widow, *Lacho Dai*, and two daughters, *Rani Dai* and *Bhola Dai*, him surviving. The Plaintiff, *Behari Lal*, is the son of *Rani Dai* by her marriage with *Gungabishen Meherwar*; the Defendant, *Madho Lal*, is the son of *Bhola Dai* by her marriage with *Sadashib Ahir*; the Plaintiff and Defendant are thus first-cousins. On the death of *Damodur Mahton*, his widow, *Lacho Dai*, succeeded to the immoveable property as a Hindu widow under the Hindu law. On the 13th of September, 1849, *Lacho Dai* executed an ikrarnamah of that date. *Lacho Dai* died in 1878; *Behari Lal* has brought this suit against *Madho Lal* and *Rani Dai*, seeking to be declared entitled to the immoveable property left by his grandfather *Damodur Mahton*; *Rani Dai* does not resist the Plaintiff's claim, and the question lies between *Behari Lal* and *Madho Lal*. The case really depends on what is the construction of the ikrarnamah. The material part of it is as follows:—

"Whereas I, the declarant, and my husband have two daughters by me, viz., (1.) *Mussummat Rani Dai*, and (2.) *Mussummat Bhola Dai*. My husband died by the will of God (on the 11th Pous, 1253, Fusli), (*a*) leaving me as heiress. All the mouzahs of this district and zillah *Tirhoot*, jatris, houses, and household furniture, ready money, grain, ornaments set with precious stones, plates, weapons, woollen stuff, silk, and male and female slaves left by him are held by me, without the partnership and possession of any other individual. Whereas *Mussummat Bhola Dai*, my daughter, has got no son, and *Mussummat Rani Dai*, my daughter, has got a son, by name *Behari Lal Meherwar*, and consequently as I have no son, according to the Shastra the said *Behari Lal Meherwar*, my daughter's son, is the heir of my husband and myself, and he has been performing the *Gyawal* duties for the jatris of my husband and myself, who come from *Tirhoot* and other places. Notwithstanding this, with a view to

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completion, I (with the permission of my husband), (*b*) do hereby declare and give in writing that all the mouzahs lying in this district and zillah *Tirhoot*, houses, household furniture, ready money, grain, ornaments, jewels, plates, weapons, woollen clothes, silk stuff, slaves, and jatris especially *Maharaja Ruder Narain Singh, Bahadoor*, the Raja of *Darbhanga*, and his relatives and descendants, and others, left by my husband, and owned and held by me, and debts and dues of my husband and myself, belong to *Behari Lal Meherwar*, aforesaid. I, the declarant, shall, till the end of my life hold possession, as I have heretofore done, without the partnership and possession of any other individual, and *shall perform acts of charity* (1) (shall receive mv maintenance) (*c*). After my death, *Behari Lal Meherwar* shall enter into possession and enjoy all the profits of all the mouzahs lying in this district, and in the district of *Tirhoot*, and all the properties moveable and immoveable, *personal and standing in my own name* (1), (cash and household effects), &c., left by my husband and by me, to which no one shall have any right, demand, or dispute."

After the execution of the ikrarnamah the widow applied to have *Behari Lal's* name put on the Collector's records, but with herself as the registered owner.

At the time of the execution of the ikrarnamah *Madho Lal* was not born, so that the Plaintiff was then the apparent reversionary heir, subject to the life estate of his grandmother *Lacho Dai*; it may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate.

It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances. Now, in the ikrarnamah in question, *Lacho Dai*, so far from destroying her life estate, expressly says, "I shall, till the end of my life, hold possession, as I have heretofore done, without the partnership or possession of any other individual;" and again she says, "after my death *Behari Lal Meherwar* shall enter into

(1) The words italicized are not in the original document.

possession," &c. The object of *Lacho Dai* was to declare the rights of *Behari Lal*, who was performing the *Gyawal* ceremonies, and obtained the fees for her; she wished to leave the management in his hands, but not to surrender her life estate. As to an alleged custom amongst *Gyawals*, that the widow could, overriding Hindu law, have an absolute and entire power over the immoveable estate of her husband, it is sufficient to say that no such custom has been proved. Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and dismiss the appeal with costs.

Solicitors for the Appellant: *Watkins & Lattey.*
Solicitors for the Respondents: *Barrow & Rogers.*

RAJAH PARTAB BAHADUR SINGH . . APPELLANT;

AND

RAJAH CHITPAL SINGH AND OTHERS . . DEFENDANTS.

J. C.*
1891
Nov. 11.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH, LUCKNOW.

Principal and Agent—Liability of Principal—Moneys borrowed by Agent in prudent Management of Estate—Onus probandi.

Where an account has been directed of such moneys as the Defendants' manager, found to have been imprudent and dishonest, would have been justified in borrowing in the course of a prudent management of his estate, *held*, that the *onus* is on the creditor to shew that each advance is within the above terms, and is not discharged by proof that the money borrowed was partly used in payment of Government revenue without proof that the rents were insufficient for that purpose.

FOUR consolidated appeals and cross appeals from two decrees of the Judicial Commissioner (Dec. 3, 1887), varying two orders of the District Judge of *Rae Bareilly* (March 1, 1887), which approved two reports of the Munsarim of that Court made in pursuance of certain directions of Her Majesty in Council reported in Law Rep. 11 Ind. App. p. 217.

The facts are stated in the judgment of their Lordships.

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

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Graham, Q.C., and *Doyne*, for the Appellant.

The Respondents did not appear.

The judgment of their Lordships was delivered by

LORD SHAND:—

This case is the sequel, or more properly the second part, of a case which has already occupied their Lordships' attention, and which is reported in Law Rep. 11 Ind. App. 211.

The creditor, Rajah *Ajit*, who is now represented by the Appellant, sued his debtor Rajah *Bijai*, now represented by Rajah *Chitpal* and others, for payment of certain sums which were stated to be vouched by a number of different securities. The Court below had given him a decree for a very considerable amount. As the result of the argument before their Lordships, this decree was recalled, and the case was remitted with certain directions to the Court below: and as a key to the meaning of these directions, it seems desirable to read the following passage in the judgment then delivered by this Board: "It is true that there is no direct evidence in the record of a conspiracy between *Ajit* and *Wahaj-ud-din*; but they acted together against the interest of this unfortunate talookdar," the talookdar being the Defendant in the case. "His agent induced him to sign a number of bonds for sums of money which have been found not to be necessary for the purposes of the estate; and *Ajit*, whose duty as a relative, a friend, and a neighbour of *Bijai*, a man of weak intellect, was to have warned *Bijai* against the proceedings which were going on to his own ruin, so far from doing this, acts in concert with the unfaithful steward, and not only does he act in concert with him, but he profits principally by their joint transactions."

That being the view which their Lordships then took of the relation between the parties, they were unable to affirm the judgment giving a decree for the large sums to which reference has been made, and a remit was made to the Court below to take the following accounts:—"1. An account of such sums advanced or paid by Rajah *Ajit Singh* by way of consideration

for the said deed of the 26th of May, 1879, as shall be proved to have been paid to and received by Rajah *Bijai Bahadur Singh* personally. 2. An account of such sums advanced or paid by Rajah *Ajit Singh* by way of consideration for the same deed as *Wahaj-ud-din* would have been justified in borrowing in course of a prudent management of Rajah *Bijai Bahadur Singh*'s estate. 3. An account of what is due upon such advances or payments for simple interest at 8 per cent. from the date of each advance or payment to the time of repayment."

The two classes of advances then which were to be allowed were, first, advances which the creditor was able to prove had been paid to and received by *Bijai Bahadur* personally; secondly, advances which the creditor was able to shew *Wahaj-ud-din*, the manager, would have been justified in borrowing in the course of a prudent management of his principal's estate. That being so, an investigation has taken place in the Court below, and the questions which are now raised are really questions of accounting, but to some extent they raise questions of principle. Their Lordships, as the result of full argument, have come to the conclusion that there is really no difficulty attending the decision of the case, that the judgment of the Judicial Commissioner is sound, and that it has been put upon grounds which their Lordships are prepared to affirm.

The creditor, the Plaintiff, has been allowed credit for all the sums which have been paid to and received by Rajah *Bijai Bahadur* personally. It is said there is one sum which it has been proved was paid to him personally which has not been allowed. That will be spoken of immediately. But the main controversy has arisen upon the second branch of the remit, as to whether sums under that branch have been improperly disallowed.

It will be necessary shortly to notice the items *seriatim*. The judgment of the Judicial Commissioner, so far as it is complained of, is in one of the records; and the first item objected to is this: a sum of Rs.6000, borrowed on the 2nd of February, 1877. The facts stated about it are these: "Bond executed in favour of *Bisheshar Singh* and *Sheo Dayal Singh*, servants of Rajah *Ajit Singh*, registered at the instance of

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Wahaj-ud-din, who received the consideration before the Sub-Registrar. The Munsarim allowed Rs.4220 7 9, and disallowed the remainder, and the District Judge indorsed the Munsarim's report. Rs.4221 7 9 were paid into the *Partabgarh Tahsil* in payment of the Government revenue." The learned Judge adds: "For such payment *Wahaj-ud-din* had no business to borrow money in February, just after the rents from the tenants had been realized."

This item raises the legal question whether, upon the facts admittedly proved, the Plaintiff is entitled to credit for this sum. The facts proved are these: in the first place the money was not paid to the Defendant himself, but was paid to *Wahaj-ud-din*; in the second place, it is shewn that to the extent of Rs.4221 that money was applied in payment of Government revenue in connection with the estate. Is that sufficient to entitle the Plaintiff to credit? In order to settle that, it is necessary to have in view the terms of the remit, which have already been set out. It appears to their Lordships to be quite clear that the *onus* of proving that any particular sum or advance falls within the second heading of the remit lies on the creditor; and the only proof that is here advanced is that money did find its way into this manager's hands, whose management was distrusted by their Lordships in their former judgment; and, secondly, that it was used partly by way of payment of revenue; but as to the necessity for resorting to borrowing money for payment of revenue, or as to any state of facts that could justify that, so as to make it a loan obtained in the course of a prudent management of the estate, there is no evidence whatever. It must be assumed, in the first instance, that a manager having the whole rents of an estate to deal with would have the means of at least meeting the necessary payments of Government revenue, and if that presumption is to be met the creditor must bring proof to overcome it. So far from there being evidence of that kind, as pointed out by the Judicial Commissioner, there is a great deal to shew the contrary. He refers to the fact that it had been shewn that *Wahaj-ud-din* was an imprudent and dishonest manager, and that, according to his own deposition, he had been wasting the money of the estate in supporting a horde of relations, friends, and

dependants, from the income of his master's property. It appears to their Lordships to be quite clear, therefore, that upon this item of the account, the mere circumstance that the money in part found its way in payment of Government revenue is no proof that there was a necessity for its so being used, or that this was done in the course of a prudent management. The judgment given on this item seems really to settle the main points in the case, because the others generally fall under the same principle.

The next item mentioned is: "Rs.2120 borrowed by *Wahaj-ud-din* on a promissory note signed by himself." As to that the Judicial Commissioner says that there is "no proof whatever that he borrowed this money in the real interest of the estate." Counsel for the Appellant pointed out, no doubt, that this sum was mentioned in one of the bonds which had been granted, but the fact of its being there mentioned was no evidence whatever that the money, although received by *Wahaj-ud-din*, had been borrowed in the interest of the estate, or in the course of a reasonable management. This item was not only disallowed by the Munsarim in his report, but also by the District Judge, and by the Judicial Commissioner; and there is, therefore, a concurrent finding of fact by those two Judges, which their Lordships would not disturb—that there is no proof that the money was required for the purposes of a prudent management of the estate.

The next item is: "Rs.2000, advanced on the 17th February, 1878, on a promissory note." That money was stated by the Judicial Commissioner to have been "realized by *Wahaj-ud-din*, who devoted Rs.1000 to the payment of Government revenue," and was disallowed by him, also for the reason which he had previously given, and which their Lordships think sound. These items dispose of the case so far as regards the main suit.

In the cross suit there are only two items that have been brought under their Lordships' notice. In regard to the first of these, item *b*, a sum of Rs.11,773 10, their Lordships think that it stands precisely in the same position as the other items already referred to, having merely this to support it, that it is proved the money went in payment of Government revenue. There is no proof whatever that it was required to be so used; or that there

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were not rents sufficient to have paid the whole of the Government revenue; and therefore this item is disposed of by what has been already said.

There remains only the item *c*, with respect to which it is said there is a specialty, to take it out of the rule with regard to the other items. What is said about it is this. It is mentioned in the deed of the 26th of May, 1879, as having been received in cash by Rajah *Bijai Bahadur*, but the Judicial Commissioner says in regard to it: "On looking over the evidence I am satisfied in coming to the same conclusion as the District Judge as to *Wahaj-ud-din* being the real recipient of the whole of this money, amounting to Rs.20,445. He can only satisfactorily account for Rs.15,510 10 paid into the Government Treasury as revenue; but, as I have said before, money should not have been borrowed on that account."

Now, in regard to this item, it has been submitted by the counsel for the Appellant, that there is evidence to shew that it was paid to *Bijai Bahadur* himself, and what is relied on is simply a narrative in one of the deeds, together with a statement by the Registrar that the correctness of what was stated in the deed had been affirmed by *Bijai Bahadur*. The question whether the money really was ever paid to *Bijai Bahadur* personally, seems to have been made the subject of very careful investigation, in the first place before the Munsarim, and again by the Judge of first instance, and finally by the Judicial Commissioner. What the Munsarim says about it is this. He presents a report to the Court in which he classifies the moneys. He puts under one schedule all the money that he is satisfied was paid personally to *Bijai Bahadur*; in the second schedule he puts the money that was not paid to *Bijai Bahadur* personally, but was paid to *Wahaj-ud-din*, and that item of Rs.20,445 is entered in the second schedule, the reason given being this:—"As to non-receipt of money by *Bijai Bahadur* himself, see evidence of Registrar and finding of Court, Rs.15,510 10, paid into treasury, as proved by *Dakhila*, remainder not proved beyond *Wahaj-ud-din's* account, which is untrustworthy." Accordingly, he holds upon the evidence before him, having gone into the whole matter, that although no doubt Rs.15,510 10 of this money found

its way to the treasury, yet it was all money that was not paid to *Bijai* personally but to *Wahaj-ud-din*. That report of the Munsarim was approved of by the Judge of first instance, and by the Judicial Commissioner. There is, therefore, the concurrent finding of fact by those two Judges, that this money was paid to *Wahaj-ud-din*, and it must come under the principles to be applied to money so paid. It has not been proved that any part of it was expended in a course of prudent management of the estate by him, and accordingly it has been properly disallowed.

On these grounds, their Lordships will humbly advise Her Majesty to affirm the judgments of the Judicial Commissioner, and dismiss the principal appeals. The cross appeals must stand dismissed for non-prosecution. Their Lordships make no order as to costs.

Solicitors for Appellant: *Lawford, Waterhouse, & Lawford.*

RAMCHANDRA NARSINGRAJ . . . . PLAINTIFF;

AND

TRIMBAK NASAGAR EKBOTE . . . . DEFENDANT.

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Nov. 26; *Dec.* 17.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Deshmukh and Gumastah—Hereditary Office of Gumastah—Creation of an Irrevocable Appointment.

In a suit by an hereditary deshmukh for a perpetual injunction restraining the Defendant, his gumastah, from receiving certain fees and emoluments belonging to the deshmukh, but entered in the Government papers in the name of the Defendant, it appeared that the Defendant's right as gumastah to act as such and receive the payments had been originally granted by Government to his ancestor, and since hereditarily enjoyed with its assent in such way that he could not be ousted by the Plaintiff:—

Held, that the Plaintiff had not the right, as against his gumastah, to collect the allowances himself directly, either from the village officers or from the treasury.

APPEAL from a decree of the High Court (Feb. 8, 1888) reversing a decree of the Subordinate Judge of *Poona* (Nov. 14, 1884).

* *Present*:—LORD HOBHOUSE, LORD HERSCHELL, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

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The object of the suit was to establish the Appellant's right to dismiss the Respondent, who, in reply to a notice of dismissal, had set up an hereditary right to hold and manage the vatan of the deshmukhi.

The plaint alleged that the Appellant's ancestor had appointed the Respondent's ancestor as his gumastah, subject to dismissal and reappointment. The Respondent, in his written statement, alleged that he and his ancestors were hereditary gumastahs, and that there were sanads to that effect from the Peishwa's ancestors and the Appellant's ancestors; also that by various proceedings of the Native and British Governments, it had been laid down that the gumastah, and not the deshmukh, was the proper person to receive the income.

A large body of documentary evidence was filed on both sides. The First Court found that, although the gumastahship had been in the family of the Respondent from generation to generation, it did not follow that it was hereditary in the sense that he could not be dismissed. Even if the office were hereditary, he considered that the holder could be dismissed for sufficient cause, and that such cause had been made out.

The High Court reversed this decision, and the material passages in its judgment are as follows:—

"There is no doubt that the agency has been for several generations with the Defendant's family. It is one thing, however, to have held it in the past from generation to generation, and another to be entitled to hold it hereditarily in the future. The principle of the law which creates and governs agencies is quite opposed to the notion of their having any hereditary quality; and this Court has refused more than once to recognise hereditary agencies or the power of a vatandar to create them. See *Ravji Raghunath* v. *Mahadevra Vishvanath* (1); *Vishnucharya* v. *Ramchandra* (2); *Krishnaji* v. *Vithalrav* (3). The learned counsel for the Defendant, therefore, very properly admitted that his client's case depended upon proof of a title derived from the same authority that granted the Plaintiff his watan; so that the point that we really have to decide in this

(1) 2 Bom. H. C. R. 237. (2) Ind. L. R. 5 Bom. 253.
(3) Ind. L. R. 12 Bom. 80.

case is, whether the Defendant has proved that the right he claims (to come between the Plaintiff and the persons who pay the allowances granted to the family of the Plaintiff, and to act as a paid agent in the matter of the collection of those allowances) has been either granted, or else so recognised and confirmed by an authority binding on the Plaintiff, that the Plaintiff cannot now turn round and contend that he can dispense with the services of the Defendant, and claim as against him to collect the allowances himself directly from the village officers or the Government treasury."

The Court then proceeded to examine a series of documents which had been put in evidence, and stated the following conclusions. First, as to the course of dealing under the Native Government, they said:—

"Looking, then, at all these exhibits, and considering them along with the actual fact of the long hereditary enjoyment of the agency by the *Ekbote* family, it appears to us impossible to come to any other conclusion than that the gumastahship or agency of the family of the Defendant was a distinct creation on the part of the Government, which had for some reason of its own determined that the deshmukhi allowances, which it had granted in inam to the family of the Plaintiff, should be recovered and paid to it only by, or through the intervention of, the family of the Defendant. Apparently also that portion of the deshmukhi allowances which was settled to be paid for the remuneration of the services of the agents was, along with the office and power of collecting the allowances, conferred on the family of the Defendant in quite as hereditary a manner as were the deshmukhi allowances themselves on the family of the Plaintiff. It is not, however, necessary for us to determine this matter. For the disposal of this appeal it is sufficient to decide that, under the Government of the Peishwa the family of the Plaintiff had not any power to disturb the Government nominee of the family of the Defendant in the collection of the dues, had not any authority to deprive him of the agency, and had not any right to collect the dues themselves."

As regards the British Government they said:—

"It is thus evident that the present Government has in no

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way changed the practice or annulled the orders of the Government which preceded it. It has given the family of the Plaintiff no authority to dispense with the services of the Defendant; it has conferred on it no right to collect the allowances directly itself. It therefore follows that the suit of the Plaintiff must fail; for the Plaintiff cannot deprive the Defendant of an office and of a function which Government has conferred on him and still allows him to enjoy. So long as the Government says to the Plaintiff, 'We will pay your allowances only through the agency of a member of the family of the Defendant,' so long must the Plaintiff receive them through that channel, unless, of course, he prefers not to receive them at all. The injunction asked for by the Plaintiff, and granted by the Lower Court, restraining the Defendant from recovering the allowances, would be not merely nugatory, but absolutely prejudicial, to the Plaintiff. It would be nugatory because it would have no effect as against the Government, for a civil Court in the present suit could not set aside the existing orders of Government that the allowances are to be paid only to the Defendant, or direct the Government to pay them to any other person; and it would be prejudicial because, if the Defendant be restrained from receiving the allowances, there remains no other person who is, under the orders of Government, legally entitled to receive them, and therefore the Government will be under no obligation to pay them at all."

Mayne, for the Appellant, contended that this judgment was wrong. He submitted that, according to the true construction of the documents in evidence, the Respondent's office of gumastah had been created by the Appellant's ancestors, and not by the Government. The acts referred to by the High Court originated in the belief that that office had been made hereditary by the deshmukhi. No title has been made out in the Respondent which would prevent his dismissal by the Appellant either at pleasure or for sufficient cause. The doctrine apparently relied on by the Respondent is that a gumastah may run with the land. There is no evidence as to the origin of the deshmukh or as to the time or mode of its creation. As regards the orders of the Peishwa relied upon, it was submitted that they did not evidence

the creation of an independent hereditary office with independent emoluments, but amounted to a judicial award founded on agreement amongst the parties as to the succession to an office which had been already created by the deshmukh. The Respondent himself, in his reply to the notice of dismissal, relied exclusively on his hereditary right as granted by the deshmukh, not by the Peishwa. There is no foundation for those passages in the judgment appealed from to the effect that the British Government imposed his office on the Respondent, allowed him to enjoy it, and would refuse to pay the dues to any one but a member of the Respondent's family. The true effect of the evidence was to establish the creation of a revocable office by the deshmukh.

The Respondent did not appear.

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Dec. 17.

The judgment of the Court was delivered by

LORD HERSCHELL:—

This is an appeal against the decision of the High Court of *Bombay*, which reversed the decision of the Subordinate Judge of *Poona*. The Plaintiff, who is now the Appellant, is hereditary deshmukh of *Kharepathar*, and as such is entitled to various fees and emoluments issuing out of villages in that district. The Respondent and his ancestors have for a long series of years acted as gumastah in respect of the fees and emoluments to which the Appellant and his ancestors have been entitled, and collected the same. The sole question raised by the appeal is whether the Appellant is entitled to dismiss the Respondent from his position as gumastah, and to put an end to his tenure of that office. The prayer of the Plaintiff in his claim is as follows:—

"The income mentioned in Clause I. of (this) plaint is entered in Government papers in the Defendant's name. The Defendant should never recover the same; and the Plaintiff will have the same entered in his name and will himself collect (or recover) the same, and the Plaintiff . . . will himself hold and manage his own vatan. The Defendant is not to raise any impediment whatever thereto. To this effect a perpetual injunction should be given to the Defendant. In respect of the same a claim of Rs.130 (is made)."

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The earliest document produced in the cause is a sanad bearing date 1741–1742. This document states that *Ramaji Shivdev* and five other persons had intimated to the deshmukh that their ancestors had served him and his predecessors generation after generation in succession, and that at present they, the six brothers, were performing the work of the sub-division, and prayed that, as their families would be greatly increased, a sanad should be prepared and granted in the names of them all; and that therefore the deshmukh, having taken consideration of the fact that their ancestors served his ancestors very much from generation to generation, the sanad was granted in the names of the six persons who were to perform the work of the gumastahship of the twenty-one villages in the sub-division. The sanad concluded in these terms:—

"You are to perform the service hereditarily and in the same way as your ancestors performed (the same)."

This document clearly recognises that the office of gumastah had been hereditary for a long period in the family of those who were then fulfilling its duties, and that it still continued to be hereditary. If the case of the Defendant had rested merely on the fact that the office of gumastah which he held had been hereditary from generation to generation, and had been recognised as hereditary by the deshmukh of that day, nearly a century and a half ago, their Lordships would have had to consider what rights were inherent in such an hereditary gumastah, and whether the deshmukh could, and if so, under what circumstances, put an end to the relation between him and the gumastah, and either collect the revenues himself or appoint some other gumastah to perform the duties for him. But it is unnecessary, in their Lordships' opinion, to determine this point, inasmuch as the Defendant's case is that his ancestors held the office of gumastah from the same authority as that from which the deshmukh derived his rights, that is to say, the sovereign power to which they were both subject, or that at all events the hereditary right to act as gumastah has been so recognised and confirmed by that authority, that the deshmukh cannot now claim to treat him as deriving his right merely from an ancestor of the deshmukh, and as subject therefore to dismissal according to

the law ordinarily regulating the relations between principal and agent.

It appears that some time prior to the year 1759 the then deshmukh used to make excessive recoveries from the villages. An order was therefore received from the Government that the amount should not be paid without an order. The deshmukh having given an undertaking that he would not receive more money for the hak rusum than was just and proper, an order was made that the hak rusum of the deshmukh were to be paid without any detriment. The order, which bore the date 6th of January, 1759, after stating that the gumastah had been entrusted with the work of recovering the amount of the hak from the villages in the sub-division under the charge of the deshmukh, concludes in these terms:—

"Therefore the amount appertaining to *Shidoji Narsingrav* is to be paid through *Rajashri Ramaji Shivdev* gumastah (*i.e.* agent). Let this be known."

This document is important, as it shews that the sovereign power had for a time deprived the deshmukh of the right to receive the accustomed payments, and that when it permitted the payments to be resumed, it designated by name the then hereditary gumastah as the person through whom the payments were to be made. Such an act was wholly inconsistent with the notion that the deshmukh could immediately deprive the gumastah of his functions, and claim either to receive the dues himself, or to appoint any person he pleased to receive them on his behalf. But the matter does not stop here. In April, 1762, a mandatory letter was sent by the Prime Minister to the managing authorities of the villages in the sub-division of *Kharepathar* in these terms:—

"*Ramaji Shivdev* will therefore transact all the business and work of the gumastahship of the sub-division aforesaid appertaining to the quarter of *Shidoji Narsingrav* deshmukh in the same way as has continued freely and without molestation from former times, and he is to collect the hak rusum and the gavkhandi (cess), &c., and send (the same) on to the deshmukh. Do you pay to *Ramaji Shivdev* the amount of the deshmukh's hak rusum, the gavkhandi cess, &c., of the sub-division aforesaid. In the

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meantime, should his kinsmen create disorder and confusion, the amount is not to be paid to anybody without His Highness's order."

The next two documents in process are two letters, the one bearing date June, 1762, and the other April, 1765. The former is addressed by the deshmukh to *Balaji Govind* and other persons, and, after stating that they had been asked in former times to conduct the hereditary gumastahship for the sub-division of *Kharepathar*, purports to confirm the same to them and their descendants. The second document purports to be a partition by the deshmukh determining that the hereditary gumastahs are to "render their service every year one by one." These letters appear to indicate that, notwithstanding the order of the Government already referred to, the deshmukh had intervened, and either recognised the rights of the several members of the family to act as gumastahs, or sanctioned their so doing. On the 27th of January, 1767, however, a mandatory letter was addressed by the Prime Minister of the Peishwa to the mokadams, or executive authorities of the villages from which the deshmukh received his dues. This letter, after stating that the gumastahship in the division aforesaid of the deshmukh belonged to *Ramaji Shivdev*, and that while the same was held by him his uncle, *Koner Trimbak*, created disorder and confusion in it for four or five years, and in the meantime collected the revenue himself and paid it over to the deshmukh, and that the circumstances of the case had been laid before His Highness, and had been investigated in consultation with arbitrators, further stated that it was decided as follows:—

"That as *Ramaji Shivdev* is a senior member among the *Ekbotes*, *Ramaji Shivdev's* son, *Gundo Ramaji*, should carry on the gumastahship of the sub-division aforesaid, belonging to the deshmukh, and that the other kinsmen and *Koner Trimbak* should act in accordance with his views. Pursuant to what is thus decided this mandatory letter is sent. (You) are therefore to continue to pay regularly to *Gundo Ramaji* the revenue collected . . . and he (*Gundo Ramaji*) will pay over the same to the deshmukh. (You) are not to pay the amount (to anybody) without a written order from *Gundo Ramaji*. As to the hak

rusum (*i.e.* dues, perquisites, &c.) appertaining to fairs at *Morgav* and *Jejuri*, (you) are to pay the amount thereof to him as the same may have been paid (hitherto). In the meantime, even if his kinsmen or the deshmukh should create any disorder or confusion, (you) are not to pay the amount to anybody without an order from the Huzur (*i.e.* His Highness). Do you take a copy of this letter in writing, and return this original letter to *Gundo Ramaji* (as a muniment of title) for enjoyment."

It will be observed that this order of the Government completely overrides what the deshmukh had purported to do by the two preceding documents already referred to, and it would rather seem that *Koner Trimbak*, who is treated as having created disorder and confusion for four or five years by collecting the revenue, was one of the persons whom the deshmukh himself had authorized to collect it. But whether this be so or not, it is quite clear that the Government not only exercised the right of appointing the person who was to act as gumastah in the department of the deshmukh, but directed that if even the deshmukh created any disorder and confusion, the amount of revenue was not to be paid to anybody without an order from His Highness. It is not necessary to refer in detail to the subsequent documents during the time prior to British rule. It is enough to state that they are all consistent with the view that the hereditary gumastah acquired a title from the Government independently of the deshmukh, and could not be displaced at his will. There is no evidence of any change having taken place since British rule has been substituted for that of the Peishwa. On the contrary, it appears that in the year 1858 the then deshmukh applied for an order that the money which had been substituted for the dues payable to the deshmukh should be paid to him direct and not to the gumastahs. On this petition the order made was as follows:—

"The money for the hak has been, from former times, paid by the Government to both the gumastahs (*i.e.* agents) themselves. This being so, you have not given any evidence that it should not be paid to them, but paid to you yourself. Therefore, there does not seem to be any special reason for making an order from this office to pay the money to you yourself. The money will be

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paid just according to the practice of making payments, may this be known."

Upon the whole, then, their Lordships see no ground for dissenting from the judgment of the Court below, that the right of the gumastah to act as such, and receive the payments, has been either granted, or else so recognised and confirmed by an authority binding on the Appellant that he cannot oust the Defendant, and deprive him of an office and function which the Government has conferred upon him, and still allows him to enjoy; and, this being so, has not the right as against him to collect the allowance himself directly, either from the village officers or from the treasury.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed from be affirmed, and the appeal dismissed.

Solicitors for the appellant: *T. L. Wilson & Co.*

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MAHARAJAH SIR LUCHMESWAR SINGH BAHADOOR, K.C.I.E. . . . . } DEFENDANT;

AND

SHEIK MANOWAR HOSSEIN AND OTHERS . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Land Tenure—Ijmali—Rights of co-Owners—Right to Ferry—Right of one co-Owner to Profits made without exclusive use of Joint Property—Account—Injunction.

It is recognised law in *India* that a man may set up a ferry on his own property, and take toll from strangers for carrying them across, and may acquire by grant or user the right to do so on the property of others whether he is co-owner with them or not.

Where he sets up a ferry on property of which he is co-owner with others whom he does not dispossess, and whose user, whether of land or ferry, he does not restrict, and expends his own money in so doing, and thereby reaps a profit for himself:—

Held, in a suit by such co-owners for an injunction and a share of the

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* *Present*:—LORD HOBHOUSE, LORD HERSCHELL, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

profits, that as the Defendant's profits had been earned by his exclusive efforts and without excluding any co-owner from his use of the joint property, such suit must be dismissed.

Costs refused, as the Defendant had unsuccessfully set up a claim to an exclusive title based on adverse possession.

Watson v. *Ram Chand Dutt* (L. R. 17 Ind. App. 110) considered. The Courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners.

A second appeal will lie on a finding of adverse possession, when such finding is a mixed question of law and fact depending upon the proper legal conclusion to be drawn from the findings as to simple facts.

APPEAL from a decree of the High Court (August 3, 1888), reversing an Appellate decree of the Second Subordinate Judge of *Mozufferpur* (Sept. 12, 1887), which affirmed a decree of the Moonsiff of *Madhubani* (March 30, 1887) dismissing the Respondents' suit with costs.

The facts of the case and the proceedings in the Courts below are sufficiently set forth in the judgment of their Lordships.

The judgment of the High Court was as follows. It may be mentioned that besides the Appellant, the manager of *Kamtowl* mouzah was a party Defendant.

"In this suit the Plaintiffs claimed an account from one of their co-sharers. They stated that they were the fourteen annas shareholders of a certain village in which the Defendant owned two annas, and that the owner of the two annas was not content with having a ferry boat himself, but that he had let out the right to levy a toll on a ferry to an ijardar, and it was found that the place from where the ferry started, the river itself, and the land on the other side, were joint property. They therefore said, and fairly enough, 'Here is a joint shareholder of a small share, who, although he is not spending himself any money upon it, gets the whole of the proceeds of a portion of the joint property, while a fair measure of what he ought to get is only his share of the ijara rent.' We do not think that that is a proposition that can be contested. In answer the Defendants pleaded that the ferry had been run for a long time by the *Kamtowl* Factory in the time of Mr. *Anderson*, that this fact had been practically admitted in the plaint, and that the land on the other side of the river was not joint but separate. That point has been found against them,

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and so in substance they raised no title to the ferry. Mr. *Anderson*, whatever rights he may have acquired, left the place and abandoned the ferry, and the property with all its interests went back to the real owners, that is, to the co-sharers in the village; and as the Defendants have only run the ferry at most since 1881, they have acquired no right by user to it whatsoever; but apart from that, it is impossible to hold, on the findings of the Lower Court, that this ferry was ever held exclusively or adversely to the other co-sharers by Mr. *Anderson* or by the factory. What the Lower Court has found is, that the landing-place of the ferry in question is on joint land of mouzah *Baigra*, and that the bed and the western bank of the river *Bagmati* are also on joint lands of village *Baigra*; that a bridge was constructed by the *Kamtowl* Factory some thirty years ago, and when that bridge fell through, a ferry was started and tolls levied by the factory, but not to the exclusion of the Plaintiffs; but, on the contrary, that the maliks of *Baigra* and their men were allowed to pass over free of toll—that is, one man established the ferry at his own expense and levied the tolls, but he never assumed that he had exclusive rights over it, and the arrangement was that the other co-sharers and their men should be carried across free of charge. It seems to us that when they had a right to go across as a right and free of toll, the possession by the factory cannot be said to be exclusive.

"We are, therefore, of opinion that the decree of the Lower Court should be set aside, and that it should be declared that the river *Bagmati* and the ghat or ferry of the said river at *Baigra* are within the said mouzah *Baigra* in pergunnah *Jarail*, and that the Defendant first party is only entitled to hold possession and appropriate the profits of the said ferry in proportion to his proprietary right in the said mouzah *Baigra*. We further direct, that the said Defendant first party do account for the profits of that ferry from date of suit to the present date, and for this purpose that the record be sent down to the Judge in the Lower Court, and that he do assess the profits; and we further direct that the Plaintiffs recover their costs in all the Courts. This case will remain on the file of this Court pending the assessment of the profits by the Lower Court."

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Cowie, Q.C., and *Branson*, for the Appellant, contended that the Respondents had not, on the findings of fact, which cannot now be questioned, shewn any title to relief. They had not asked for the accounts directed by the High Court, nor are they entitled to them. They were not entitled in any way to the ferry or to the profits thereof. The ferry had been established and was being worked by capital to which they did not contribute. They had been, no doubt, co-owners of the land over which the ferry was worked; but a title by adverse possession had been acquired against them. Otherwise, if there had been no denial of title, no exclusion from possession, and even, as the Respondents say, the concession to them of a free use of the ferry, still on the authority of *Watson* v. *Ram Chand Dutt* (1), they were not entitled to a decree either for joint possession, or an account, or an injunction. Reference was also made to *Mahomed Ali Khan* v. *Khajah Abdul Gunny* (2). The Appellant was entitled to the whole profits of an undertaking which was established and worked by his own funds exclusively, without any interference with the Respondents' rights as co-owners, inasmuch as the land itself was not in their actual use, and they themselves have not been excluded from the user of the ferry to any extent required by their personal convenience.

The Respondents did not appear.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

The Respondents instituted this suit against the Appellant in respect of a ferry worked by him across the river *Bagmati*, at a point where it flows through the mouzah *Baigra*. The Plaintiffs are proprietors of fourteen annas of that mouzah, and the other two annas are vested in the Defendant, who is also the proprietor of a factory and land in the adjoining mouzah of *Kamtowl*. The lands are held in several puttis, but the river bed and the landings of the ferry have never been divided, and are still ijmali land of the mouzah.

In the plaint it is alleged that a public road lies to the east of

(1) L. R. 17 Ind. Ap. 110. (2) Ind. L. R. 9 Calc. 744.

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the river, and close by the river to the west lies the *Kamtowl* Factory; that during the rainy season the river is impassable without bridge or boat; that formerly a bridge had been constructed over the river on the part of all the proprietors; that it came down for want of repairs; that a boat was then kept there, and the management and supervision thereof was entrusted by all the proprietors to Mr. *Anderson*, the former holder of the Defendant's share in *Baigra*; that the ferry did not yield any adequate income or profit, and whatever profit it yielded was applied to the expenses on account of the boat, &c. It then went on to state that the Defendant had let out the ferry to ticcadars, had appropriated the rent, and had refused to pay any share to the Plaintiffs.

The prayer of the Plaintiffs is:—

"1st. That a decree may be passed in favour of your Petitioners, Plaintiffs, declaring that the river *Bagmati* and the ferry on the said river lie within the circumference and area of mouzah *Baigra*, pergunnah *Jarail*, and that the first party Defendant is entitled to hold possession and appropriate the profits of the said ferry in proportion to the extent of his proprietary right in the said mouzah *Baigra*.

"2nd. That as a result of the above finding, your Petitioners, Plaintiffs, may be declared to be entitled to get the profits of the said ferry in proportion to the extent of their share, and the Defendant may be restrained from offering opposition to the possession of your Petitioners."

By his written statement, the Defendant alleged that the Plaintiffs had been out of possession of the ferry for twelve years, and that he and his predecessors in title had held possession for upwards of twenty years; that the landing-place on the west of the river was part of *Kamtowl*, and the landing-place on the east was part of the putti allotted to the Defendant in *Baigra*. He alleged that the bridge and the boat were maintained at the sole expense of the proprietor of the *Kamtowl* Factory, and the tolls taken by him.

The cause was tried before the Moonsiff, who, by decree dated the 30th of March, 1887, dismissed the suit with costs. His reason was that the Defendant had established exclusive use and

possession by himself and his predecessors in title at least since the year 1856; and that it was adverse to the Plaintiffs and their predecessors. Apparently he considered that the case falls within the 26th section of the *Limitation Act* of 1877, relating to the acquisition of easements.

Both parties appealed to the Subordinate Judge. The Defendant's appeal was entirely misconceived, and, having been dismissed with costs, need not be further noticed now. The Plaintiffs' appeal was also dismissed with costs, and it is important to see on what grounds. Their Lordships are now sitting in appeal from a decree of the High Court made on a regular second appeal from that of the Subordinate Judge under sect. 584 of the Code. No leave to appeal from the decree of the Subordinate Judge direct to Her Majesty in Council has been asked for, so that the present hearing must be based upon the materials which were open to the High Court, and the findings of the Subordinate Judge on matters not involving questions of law must be taken as conclusive.

After shewing that the Plaintiffs had failed to make good their allegations with respect to the erection and maintenance of the bridge and boat, and the application of the receipts, the learned Judge proceeds as follows:—

"The facts stand thus: The bed of the river *Bagmati* is on the ijmali land of the village of *Baigra*; the road which comes up to the east landing is sirkari or Government road in village *Baigra*; the julkur of the river is enjoyed by the maliks of *Baigra* as a body; the western bank or brink of the river is also village *Baigra*; the bridge on the river was constructed and laid by the *Kamtowl* Factory more than thirty years ago; that, when the bridge fell through, a boat was placed on its site and plied, when necessary, by men employed by the kuti; that a toll was levied at the crossing ghat exclusively by the kuti; that the kuti uninterruptedly enjoyed the profit and maintained the ferry to the exclusion of the Plaintiffs for more than twenty years, but, the maliks of *Baigra* and their men, &c., were allowed to cross free of tax."

In a subsequent passage he deals with an allegation by the Plaintiffs, that they had given express permission to the

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Defendant and his predecessors to use the ferry as they did, and finds that there was no such express permission. He also states that the landings of the ferry are the ijmali land of *Baigra.* On this state of facts the Subordinate Judge came to this conclusion :—

"The owner of the *Kamtowl* Factory has been in exclusive possession of the profits of the ferry for a period extending over twenty years, and there was no express permission on the part of the Defendants. The profits, as the books of the Defendants shew, were not inconsiderable, and I do not think that the Plaintiffs of their own accord and free will allowed the kuti to derive this profit. This possession by the kuti must have been against the wishes of the Defendants and therefore adverse. There was no express trust; and implied permission cannot, under the circumstances, be inferred."

With regard to the use of the bridge and ferry by the maliks of *Baigra,* the Subordinate Judge looks upon it as a privilege not affecting the right to the ferry. He says that no act of possession was exercised by the Plaintiffs over the ferry itself within the last twenty years before the date of suit. He also takes the view of the Moonsiff, that the case falls within sect. 26 of the *Limitation Act.*

On the second appeal the High Court differed from the Subordinate Judge on two grounds. The first was that the Defendant had only run the ferry since 1881, and therefore could not plead any bar by time against the Plaintiffs. On this point their Lordships are clear that the facts found shew a continuity of enjoyment by the owners of the *Kamtowl* Factory and of the two-anna share in *Baigra,* which was not broken by the Defendant's purchase from the former owners. The plea of limitation or prescription, therefore, is just as available for the Defendant as it would have been for his vendors had their possession continued unchanged. The second ground taken by the High Court is, that the owners of *Kamtowl* never had exclusive possession, because there was an arrangement that the maliks of *Baigra* and their men should be carried across free of charge, and they had a right to go across "as a right, and free of toll."

The High Court discharged the decree of the Lower Court, and pronounced the following decree:—

"That it should be declared that the river *Bagmati* and the ghat or ferry of the said river at *Baigra* are within the said mouzah *Baigra* in pergunnah *Jarail*, and that the Defendants first party are only entitled to hold possession and appropriate the profits of the said ferry in proportion to their proprietary right in the said mouzah *Baigra*. We further direct, that the said Defendants first party do account for the profits of that ferry from date of suit to the present date, and for this purpose that the record be sent down to the Judge in the Lower Court, and that he do assess the profits; and we further direct that the Plaintiffs recover their costs in all the Courts. This case will remain on the file of this Court pending the assessment of the profits by the Lower Court."

It appears to their Lordships that, in saying that the maliks of *Baigra* used the ferry "as a right," the High Court departed from the findings of pure fact by the Subordinate Judge, which they appear to be resting on. He only found that the maliks were allowed to cross free of tax. That does not point to any arrangement, or to any right. Nor is there any suggestion made by the Plaintiffs of such an arrangement; which indeed would be contrary to the case of the Plaintiffs, who allege that, first the bridge, and afterwards the boat, were set up on their behalf. Still the effect of their actual use of the ferry remains to be considered. And it appears to their Lordships that, though the question appears to be trifling as regards money value, it is of a very peculiar kind, and presents considerable difficulties.

Whatever the Defendant may think himself entitled to, he has not in this suit claimed to possess a ferry in any such sense as would entitle him to restrain competition. It is recognised law in *India* that a man may set up a ferry on his own property, and take toll from strangers for carrying them across, and may acquire such a right by grant or by user over the property of others; and, except as affecting the proof of his acquisition of title, it can make no difference whether he is a co-sharer with those others or not. That is common ground to the Moonsiff, the Subordinate Judge, and the High Court in this case. But

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the Defendant is not using his own property, except that he owns it jointly with the Plaintiffs; and, as no grant ever was made to him, he can only set up exclusive right against the Plaintiffs by shewing either that he has dispossessed them for twelve years, or that he has held possession adversely to them for twelve years, or that he has enjoyed what he claims, for twenty years, as an easement and as of right.

It is true that the Subordinate Judge finds that the Defendant's possession for twenty years was adverse to the Plaintiffs. The question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law, or a mixed question. Their Lordships have no wish to restrict the range of a rule which is designed to lessen the expense of litigation in cases of small value commenced in the Moonsiff's Court. But in this case the Subordinate Judge himself appears, quite rightly as their Lordships think, to have treated the question of adverse possession apart from his findings on simple fact, and as the proper legal conclusion to be drawn from those findings. Moreover, the Subordinate Judge lays down the right of ferry to be a right in the nature of an easement, and to require an uninterrupted exercise during twenty years for its acquisition. But the terms of his ultimate finding are not fitted to those of the statute. Sect. 26 of the *Limitation Act* says nothing about adverse possession, and the Subordinate Judge does not say that the Defendant enjoyed the ferry as an easement, and as of right, which is what the statute requires. For these reasons their Lordships think that the High Court were at liberty to come to conclusions different from those of the Subordinate Judge on this point.

Their Lordships further concur with the High Court as to the effect of the use of the ferry by the maliks of *Baigra* and their men. The Subordinate Judge quotes a passage from a decision in the case of *Mahomed Ali Khan* v. *Khajah Abdul Gunny* (1), in which Mr. Justice *Wilson* points out that many acts which would be clearly adverse and might amount to dispossession as between a stranger and the true owner of land, would between joint owners naturally bear a different construction. Whether

(1) Ind. L. R. 9 Calc. 744.

the facts found in this case would, as between strangers, raise the inference of adverse possession or of enjoyment of the ferry as an easement and as of right, is a question which need not be discussed. For the parties are co-owners, and the Defendant has made use of the joint property in a way quite consistent with the continuance of the joint ownership and possession. He has not excluded any co-sharer. It is not alleged that he has used the river for passage in any such way as to interfere with the passage of other people. It is not alleged that, even in the time of the bridge, there has been any obstruction at the landing-places. It is not alleged that the Defendant's proceedings have prevented anyone else from setting up a boat for himself or his men, or even from carrying strangers for payment. So far from inflicting any damage upon the joint owners, the Defendant has supplied them gratuitously with accommodation for passage. All that is complained of is that he has expended money in a certain use of the joint property, and has thereby reaped a profit for himself. But property does not cease to be joint merely because it is used so as to produce more to one of the owners who has incurred expenditure or risk for that purpose.

Their Lordships then agree with the High Court in thinking that the Defendant has not acquired any easement or any title by adverse possession. But inasmuch as their conclusion is founded on the view that the joint possession has been continuously maintained, they cannot concur in the decree appealed from. There seems to be but little authority in decided cases to shew how far Courts of justice will interfere to control the use of property as between joint owners, or how far they will leave those who are dissatisfied with its use to seek a remedy by partition. The case of *Watson & Co.* v. *Ram Chand Dutt and Others* (1) is that which throws the most light on the subject.

In that case Messrs. *Watson & Co.* were co-owners of a joint estate. They had procured leases of a plot of land from the others, had built a factory, and had produced indigo. After the expiry of their leases they went on in the same way. The other co-owners wished to grow oil-seeds, and they sued for an injunction to restrain the *Watsons* from growing indigo on ijmali land.

(1) L. R. 17 Ind. Ap. 110.

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The District Judge granted the injunction prayed for. On appeal, the High Court varied the form of the injunction by restraining the *Watsons* from excluding the plaintiffs from the enjoyment of ijmali land. On appeal to Her Majesty in Council this Committee made the following observations :—

"It seems to their Lordships that if there be two or more tenants in common, and one (*A.*) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (*B.*) attempts to come upon the said part for the purpose of carrying on operations there, inconsistent with the course of cultivation in which *A.* is engaged and the profitable use by him of the said part, and *A.* resists and prevents such entry, not in denial of *B.'s* title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of *A.* would not entitle *B.* to a decree for joint possession. . . . In *India* a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husband-like manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of *India*, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In *Bengal* the Courts of justice, in cases where no specific rule exists, are to act according to justice, equity, and good conscience, and if in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital."

The decrees below were discharged, and the decree made in lieu thereof gave the plaintiffs compensation for the exclusive use of the joint land by the *Watsons*.

Their Lordships have not referred to the case of the *Watsons* in order to follow the decision, for the facts of that case and of this are very different; but for the purpose of shewing authority for the position that the Courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners, though they will do so in proper cases.

Now in this case the High Court has not granted any injunction, but it has made a declaration with respect to the possession and profits of the ferry, and has directed an account of the profits accordingly. But if the Defendant's use of the landing-places and the river is consistent with joint possession, why should the Plaintiffs have any of the profits? They have not earned any, and none have been earned by the exclusion of them from possession, as was done by the *Watsons* in the case cited. By the Defendant's acts they have lost nothing, and have received some substantial convenience. It will be time enough to give them remedies against him when he encroaches on their enjoyment.

But then they ask to have it declared that the river and the ferry are within mouzah *Baigra*, and that the Defendant may be restrained from offering opposition to their possession. If the Defendant had not denied their title it would clearly not have been proper to give them any such relief. Should it make any difference in this respect that, when asked to account for the profits of the ferry, the Defendant has sought to protect himself by setting up a title in himself to the profits of the ferry and to the landing places? With some doubt their Lordships think not. It does not appear that the Plaintiffs, even before the suit, asked for anything but a share in the profits, and though they now ask for removal of opposition to their possession, they themselves state, and their Lordships now hold, that all the co-sharers have been in possession all along. No such decree, therefore, is needed. But the costs of the suit have been seriously aggravated by the Defendant's claim of exclusive ownership; and as this claim is unfounded, he ought not to

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have the costs which otherwise would have been awarded to him. Throughout this litigation the Plaintiffs have been asking too much and the Defendant conceding too little. There should be no costs in any of the Courts, nor of this appeal.

The proper course will be to discharge all the decrees below, and to dismiss the suit. Their Lordships will humbly advise Her Majesty accordingly.

Solicitors for the Appellant: *Sanderson, Holland, & Adkin.*

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NEIKRAM DOBAY . . . . . PLAINTIFF;

AND

BANK OF BENGAL . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Pledgor and Pledgee—Sale by Pledgee to himself—Sales by Pledgee after determination of Pledge—Wrongful Conversion.

Held, that a sale by a pledgee to himself of securities pledged is void; but it does not put an end to the pledge, so as to entitle the pledgor to recover them without payment of the amount thereby secured; nor does it entitle him to damages:

Held, further, that the pledgor is bound by re-sales duly effected by the pledgee to third persons after such abortive sales to himself:

But *held*, that where the pledgee has erroneously represented to the pledgor before such re-sales that his securities have been sold, they can no longer be regarded as pledged, and he becomes on such re-sales liable for the value thereof as for a conversion.

APPEAL from a decree of the High Court (June 7, 1888), affirming a decree of a Division Bench (Jan. 20, 1888).

The prayer of the plaint was for damages in respect of the bank having sold the Appellant's Government promissory notes improperly and without reasonable notice; (2.) for an account and payment; (3.) for further relief.

The facts are stated in the judgment of their Lordships. The First Court held that the Appellant was entitled to an account

* *Present:*—LORD MORRIS, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

from the bank of the securities pledged and parted with, and the application of the proceeds, and more particularly so "where there had been a sham sale to the extent of four lakhs to the pledgee himself," and further that "the transaction (*i.e.*, of the sale and purchase of those four lakhs) was absolutely null and void, and must be treated as if there were no sale at the time."

In the result the Court held that "the Appellant was entitled to require the bank to replace the paper which it had improperly made away with, and in the accounts between him and the bank, to treat it as worth what it had been proved to be worth at the date of plaint filed, or at the date of hearing, whichever he preferred," and to recover the interest which the four lakhs had produced up to the date of final decree; and that the bank would, in taking the account, be entitled to credit for the amount of the loan, but to no interest after the time when the bank closed the loan, *i.e.*, the 30th of January, 1884.

In addition to those four lakhs, the Court held that as to the two further amounts of Rs.5000 and Rs.50,000, sold to the depositors' department of the *Bank of Bengal* on the 2nd and 18th of January, 1884, the same rule should be applied.

The judgment of the High Court was as follows:—

"The question arises whether, assuming that the securities remained in the hands of the Defendants after they had taken them over in the books, subject to the same rights as before, the disposal of them some few days after by the Defendants by sale and exchange, was a conversion of them for which they are liable to pay damages, or whether they were in the position of trustees for their debtor, and so are liable to replace the fund. In our opinion no such relation existed with reference to the securities. No doubt, when a creditor has sold the pledge and paid himself out of the proceeds, he is a trustee of the balance, if any, which remains in his hands. But we are not aware that it has ever been held that a pledgee of chattels, with a right to sell on due notice, is a trustee for the pledgor of the security, and we think that the special property which he undoubtedly has in the security is inconsistent with his position being that of a trustee.

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"In our opinion the position of the Defendants, both before and after the taking over in their books, was that of pledgee of chattels. Granting, that when the bank took over the four lakhs, that transaction did not amount to a sale at all, but that the four lakhs still remained as a pledge in their hands, and that their subsequently selling them without further notice and without further demand was a wrongful conversion of the securities, for which they are liable to pay damages; still, the only question is, what damages has the Plaintiff sustained by such wrongful acts of the Defendants, assuming them to be wrongful.

"From this point of view the present case is not distinguishable from that of *Johnson* v. *Stear* (1), and many well-known cases of the same kind, in which it has been held that where the pledgee of chattels with a power of sale, which can only be exercised under certain conditions, sells the chattels without performing the conditions, he is guilty of wrongful conversion, and that the measure of damages is the value of the chattel at the time of conversion, less the amount for which it was pledged.

"In the present case, the Defendants have credited the Plaintiff with the market value of the securities at the time when they were taken over in their books, and have ceased to charge him with interest on the sums credited from those dates. Between the time when they were taken over, and the time when they were disposed of, the market had fallen, so that at the time of conversion, the value was less than that for which the Plaintiff has had credit, and the damage is consequently nominal. The Defendants have paid into Court in this action the sum of Rs.326 7 4, which is the amount due to the Plaintiff on the balance of account, giving him credit for the four lakhs at their value at the dates when they were taken over. When they were converted, their value was less, and we find as a fact that the sum paid into Court is enough to satisfy the entire claim of the Plaintiff against the Defendants in respect of the causes of action for which this suit is brought, either in its original or its present form, and accordingly we dismiss the Plaintiff's cross objections, decree the Defendants' appeal, and

(1) 15 C. B. (N.S.) 530.

dismiss the Plaintiff's suit with all costs in this Court and in the Court below."

Finlay, Q.C., and *Branson*, for the Appellant, contended that he was entitled to have the accounts taken as decreed by the First Court. Both Courts had treated the sales by the bank to itself of the Appellant's securities as nullities. Both Courts, however, lost sight of the fact that there had been misrepresentation by the bank to the Appellant to the effect that such sales were proper and valid sales—that is, sales to third parties. Acting on this misrepresentation, the Appellant had lost his right to redeem. His right thereto had been practically refused by the bank. Consequently the Appellant was entitled in equity to a declaration of the nullity of such sales, and to an account against the bank as trustees of his securities. He was entitled to be credited with the market price of such securities, either on the date of plaint filed or on the date of decree at his option. It was an error to treat the Appellant's rights as if the case were merely one of wrongful conversion by the bank of his securities. He was, as pledgor or mortgagor, entitled to redeem according to the terms of his pledge. And, as regards interest, inasmuch as the relationship of creditor and debtor was terminated by the bank, interest did not run in its favour after such termination. The Appellant was entitled to the accruing interest on his securities since he was refused the exercise of his right to redeem. Costs ought not to have been given against him. And the costs of the First Court should have been given him, for it was at the hearing that the misrepresentations were discovered, and down to the hearing no proper accounts had been given.

Johnson v. *Stear* (1), relied on by the High Court, is distinguishable from this. That was an action of trover. This resembles one of detinue. The sales by the bank to itself being void, the Appellant was entitled to the thing pledged. It is no answer for the pledgee to say that he has resold it after taking it over in his books. The pledgor was entitled to possession. His rights must be dealt with on that footing. [Reference was made to *Jones* v. *Dowle* (2); *Wilkinson* v. *Verity* (3); *Lord*

(1) 15 C. B. (N.S.) 530. (2) 9 M. & W. 19. (3) Law Rep. 6 C. P. 206, 209.

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Midleton v. *Eliot* (1); *Donald* v. *Suckling* (2); *Halliday* v. *Holgate* (3); *James* v. *Rumsey* (4).

Rigby, Q.C., and *Doyne*, for the Respondents, contended that the Courts below should, on the evidence, have held that the sales by the bank to itself under the circumstances of the case were valid. No issue was raised as to any rights which the Appellant might have with regard to the securities sold by the bank to itself, nor was the frame of the suit intended to raise that question. The damages sought in this case were simply those which were alleged to arise from improper sales—that is, made without reasonable notice to the Appellant. The suit did not treat the sales by the bank to itself as nullities, but as irregularities which deprived the Appellant of his right to redeem, and gave him a cause of action in respect of such deprivation. The price at which the bank took over the securities was higher than that at which they were subsequently resold, and the Appellant sustained no damages such as would be recoverable either in trover or detinue. With regard to the re-sales, no further demand or notice was legally required before they were effected. The account sought would shew nothing to be due, even if taken on the footing that the securities ought not to have been sold at all. For, supposing the sales by the bank to itself to be, as was held below, nullities, and the re-sales wrongful conversions, still the measure of damage was the value of the securities at the date of conversion, which was less than that for which the Appellant had received credit before he sued. If both the sales and the re-sales are to be set aside as nullities, and the account re-opened, it should be on the footing of charging the Appellant the contract rate of interest calculated up to the final taking of the account; and inasmuch as that was 9 per cent. as against the 4 per cent. accruing on the securities, the longer the account remained open the greater would be the balance against the Appellant.

Finlay, replied.

(1) 15 Sim. 531.
(2) Law Rep. 1 Q. B. 585.
(3) Law Rep. 3 Ex. 299.
(4) 11 Ch. D. 398, 404.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The action which is the subject of this appeal was brought in the High Court at *Calcutta* by the Plaintiff, a dealer in Government securities, against the *Bank of Bengal*, which carries on business in *Calcutta*. The plaint alleged that on or about the 19th of July, 1883, the Plaintiff entered into an arrangement with the bank as to his future dealings, it being agreed that in all future loans taken by him the bank should charge 1 per cent. less than the usual bank rate of interest, and should not call for prompt or heavy margins in respect of Government promissory notes deposited for the purpose of securing loans; that under this agreement the Plaintiff took extensive loans from the bank, giving promissory notes, and depositing Government paper as security; that, notwithstanding the agreement, the bank called for prompt and heavy margins, and between the 3rd of October, 1883, and the 31st of January, 1884, notwithstanding a tender of seven lakhs of rupees and an offer of four lakhs more, wrongfully and without due and reasonable notice to the Plaintiff, sold off at a great loss to him all the Government promissory notes in their possession deposited by the Plaintiff as security for the loans, and from the proceeds paid off the loans. The questions raised at the trial were, first, what were the terms of the arrangement, and, secondly, had they been broken by the bank?

The following are the facts proved: The bank, through Mr. *Gordon*, its chief accountant and deputy secretary in *Calcutta*, agreed to grant the Plaintiff loans at the special loan rate on their usual conditions of business, one of which was "The bank reserves to itself the option of selling securities that have been deposited against loans at any time after the issue of notice of demand," and another, "Interest on securities in deposit against loans or overdrawn accounts will be realized by the bank on receipt of written instruction from the borrower." Immediately upon the making of the agreement the Plaintiff began to take loans to large amounts from the bank upon the security of the deposit of Government notes. Some of these loans were

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consolidated and renewed, the last renewal being under the date of the 21st of December, 1883.

At that time the market for these securities was falling, and on the 28th of December, 1883, Mr. *Gordon* wrote to the Plaintiff, requesting that he would at once either pay off his demand loan or deposit the additional margin of Rs.24,300, failing which he said the securities deposited against the loans would be sold. Nothing was done on this letter. On the 2nd of January, 1884, Mr. *Gordon* again wrote to the Plaintiff that unless he made satisfactory arrangements to adjust the margin and interest due on his loan account by noon the next day the bank would proceed at once to sell his Government securities. On the 12th of January Mr. *Gordon* again wrote to the Plaintiff that unless the margin on the loan account and interest to the 31st of December, 1883, was adjusted on the 14th of January the bank would at once proceed to sell his securities as advised in the letter of the 2nd. Nothing having been done by the Plaintiff the bank on the 15th of January commenced to sell his securities, crediting the proceeds to the Plaintiff's account, and informing him by letter that they had done so. The sales continued during the month of January. On the 30th of January the Plaintiff paid to the bank the sum of Rs 674,467, and received from it Government notes of the nominal value of Rs.717,500 which the bank represented as being, and the Plaintiff believed to be, the whole of his securities remaining unsold in the bank's hands. On the 31st of January Mr. *Gordon* sent the Plaintiff an account, shewing a balance in the Plaintiff's favour of Rs.326 7 4, which the Plaintiff refused to accept, and the bank paid it into Court.

Previous to the trial it appeared, by the answer of the bank to interrogatories, that of the securities stated in the account to have been sold Rs.455,500 had not been in fact sold, but were taken over by the bank in their books at the market price of the day, Rs.400,000 to the bank itself and Rs.55,000 to the depositors' department. It appeared at the trial that the bank had resold nearly all, if not all, of these Government notes, and when the case came before the High Court on appeal further evidence was taken before it as to the dealings of the bank with the Plaintiff's securities. It was then proved that the whole of the securities

taken over by the bank were disposed of by them between the 17th of January and the 8th of February, 1884, either by sale or in exchange for other securities, and that the amounts realized were in every instance less than the prices for which credit had been given for them to the Plaintiff.

The learned Judge who tried the suit made a decree dismissing the claims of the Plaintiff so far as they were included in the plaint, but declaring that the sales by the bank to itself were null and void against the Plaintiff, and that the Plaintiff was entitled to recover the value of the Government promissory notes so sold at the market rate on the date when the suit was instituted, or, at the option of the Plaintiff, on the date of the hearing, with interest at 4 per cent. on their par value from the respective dates of the sales, and that the bank was entitled to credit for the advances to the Plaintiff, with interest at the rates claimed by the bank up to the dates when the bank closed the several loans. In his judgment he said interest could not run as to the sum of money which the amount of the pretended sales purported to wipe off after the dates of them, and an account was ordered to be taken on that footing. The bank appealed, and the High Court in its appellate jurisdiction allowed the appeal and dismissed the suit.

Their Lordships are of opinion that this decision should be affirmed. The sales by the bank to itself, though unauthorized, did not put an end to the contract of pledge, so as to entitle the Plaintiff to have back the Government notes, without payment of the loans for which they were security, and until the delivery of the account on the 31st of January, the loans being unpaid after demand, the bank was entitled to sell the notes and credit the Plaintiff with the proceeds. The Plaintiff did not sustain any damage by the sale to the bank of the notes which were resold by it before the 31st of January.

As to the notes which were resold by the bank after the 30th of January, the position of the bank was different. It was represented to the Plaintiff by the bank and believed by him that the Government notes which he received on the 30th of January were the whole of his securities remaining unsold in the hands of the bank. He paid the Rs.674,467 in order, as he believed, to

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redeem the whole of his securities. It would be inequitable to allow the bank, after this transaction, to treat the securities, which it had sold to itself, and then had in its hands, as still subject to the pledge. In their Lordships' opinion, the bank should be held to be no longer a pledgee of these notes, and to have converted them to its own use, and to be liable in damages for the value of them including the interest thereon. But if the bank is so liable, the Plaintiff cannot have credit in the loan account for the proceeds of these notes. He cannot both affirm and disaffirm the sales to the bank. It appears from the account of the dealings of the bank with the Plaintiff's securities, referred to in the judgment on appeal, that the rate of interest on the loan from the 1st to the 5th of January, 1884, was 7 per cent., from the 5th to the 20th 8 per cent., and from the 20th to the 30th 9 per cent. The rate of interest on the Government notes was 4 per cent., and it is obvious that the longer the account was kept open the more the balance would be against the Plaintiff. If the Plaintiff has sustained any special damage by the conduct of the bank the evidence of it is not before this Board. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal. The Appellant will pay the costs of it.

Solicitors for Appellant: *Barrow & Rogers.*
Solicitors for Respondents: *Morgan, Price, & Mewburn.*

SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . PLAINTIFF;

AND

DURJIBHOY SINGH AND OTHERS . . . DEFENDANTS.

J. C.*

1891 Nov. 19, 20; Dec. 2.

1892 Feb. 6.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Res judicata—Decree for Possession—Ascertainment of Boundaries—Acquiescence.

Where a decree for possession of lands in suit has been made, the plaint describing such lands by general boundaries not sufficiently detailed to admit of exact identification, the execution proceedings under which possession has been given not defining them with any greater certainty, the possession actually taken having been of lands demarcated shortly after possession was delivered, it did not appear by whom, but in a manner subsequently approved by the revenue authorities:—

Held, in an action by Government to eject the decree-holders, that the lands so demarcated must be accepted as covered by the decree, and that the action was barred as *res judicata*.

APPEAL from a decree of the High Court (Dec. 13, 1886) reversing a decree of the Subordinate Judge of *Bhagulpore* (March 30, 1885), and dismissing the Appellant's suit with costs.

The facts appear in the judgment of their Lordships.

Robinson, Q.C., and *Branson*, for the Appellant, contended, on the point of *res judicata*, that the High Court were wrong in holding that the boundaries of the lands sued for in 1862 corresponded with the boundaries of the lands now in suit. The burden was on the Respondents, who set up the plea to prove that identity, and they had failed to do so. The evidence shewed that they were different lands. It was proved to the satisfaction of the Court of First Instance that the Appellant had been in possession of the lands in suit, at all events, from 1848 to 1862, and the High Court had not dissented from that finding. The appellant had on that finding acquired a title by prescription

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

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to the lands in suit. Accordingly it was for the Respondents to shew very clearly that the lands were also covered by the decree of the 13th of June, 1865.

The Respondents did not appear.

1892. Feb. 6. The judgment of their Lordships was delivered by

LORD SHAND:—

The Government of *India*, by their plaint in this case, dated the 30th of January, 1883, claim possession, as their property, of 2169 bighas of land in the district of *Monghyr*, described by boundaries and delineated on a plan produced with the plaint. It is not disputed that the Defendants have been in possession of the lands since June, 1870; but the Plaintiffs allege that this possession was obtained improperly, and without title on the Defendants' part; that, although it has endured for upwards of twelve years, the ordinary law of limitation will not avail the Defendants in a question with the Crown; and that the lands remain the property of the Government, being part of the mouzah of *Bhawanundpore*, which admittedly belongs to them.

The Defendants maintain that the lands claimed are their property, and form part of their mouzah of *Ishakpore*. They explain that many years prior to 1862 the river *Ganges*, which had flowed considerably to the south of *Ishakpore*, gradually encroached on the land to the north, and that in this way, in the course of time, it encroached on and covered or washed away the lands of *Ishakpore* prior to 1848; but that subsequently the river receded, taking again a southward course, and that in this way the lands of *Ishakpore* gradually again emerged on the north of the river, their old situation; and they maintain that their property never was lost, but that in 1862 they had a right to these lands under the Government settlements and surveys of a much earlier date. In addition, however, to this contention, they maintain as a defence, which must in the first place be entertained and disposed of, that it is *res judicata* that the lands in question belong to them, for they say that it was so decided in a suit at their instance against the Plaintiffs which was raised in 1862, and in which final judgment was given in their favour in

1865, followed by possession taken shortly after the decree, and, at all events by possession since June, 1870.

The Subordinate Judge held that the Plaintiffs were entitled to succeed in their claim to the land in question, with the exception of a triangular area described in his judgment. His view was that the possession obtained by the Defendants after the judgment in their favour in the suit of 1862 was not such as could be effectual to them, as the Government officials had been misled in the proceedings relied on, and that the Government settlements and surveys of earlier times sustained the conclusion that the lands in 1862 were not part of *Ishakpore*, but of *Bhawanundpore*. The High Court, however, reversed this decision, and decreed the dismissal of the suit with costs, holding that in a question between the parties "the lands now in dispute must be found to be lands which were recovered by the now Defendants against the Government in the suit brought in 1862, and that therefore the claim on behalf of the Secretary of State wholly fails."

It cannot be disputed that if the lands now in question were included in the decree granted in the suit of 1862 the judgment of the High Court must stand, and it becomes necessary, therefore, in the present appeal to ascertain the facts bearing on this question.

The decree, dated the 13th of June, 1865, ordered "that the suit of the Plaintiffs be decreed," and "that the Plaintiffs be put in possession of the lands in suit." The plaint itself described the lands of *Ishakpore* (of which a share of 15 annas 5 dams formed the subject-matter of the suit) by general boundaries only, and not by boundaries stated with so much detail, or so delineated on a detailed plan, as to admit of the lands being identified and taken possession of in the same way as if they had been demarcated or described in detail. The decree was issued on the 16th of June, 1865. An execution suit followed, in which an order was granted on the 7th of February, 1868, directing possession to be given to the decree holders. A return to this order, dated the 6th of May, 1868, bears that the peon "went to the mofussil and duly delivered possession" to the decree holders, from whom he took a receipt acknowledging the delivery of possession; and this receipt, duly filed in the proceedings of the Court and dated the 26th of April, 1868,

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declares that possession was "awarded by beat of drum," and was obtained. On the face of these proceedings, there is nothing to define the lands in suit more exactly than they are defined in the plaint. Some evidence has been adduced to shew that the peon who executed the order placed bullas or bamboos along the boundaries of the ground to mark off the special lands of which delivery was made; but the evidence as a whole does not support this view.

It is, however, quite clear on the evidence that immediately after the delivery of possession of the 26th of April, bullas were put into the ground to mark off the land described in the decree —it does not clearly appear by whom—and the evidence shews that the possession since that time, or immediately after it, of the land enclosed by these bullas has been with the Defendants. Their Lordships hold this to be the result of the evidence because of the following facts proved. On the 29th of April, 1868, *Gundur Singh* and others had obtained a renewed lease and settlement of lands of *Bhawanundpore*, and on the 13th of May, 1868, they complained to the settlement officer that the *Ishakpore* maliks had, in execution of decree through the nazir of the Court, taken possession of about 2000 bighas of *Bhawanundpore* by posting bullas. The collector deferred inquiry into the matter until the next cold season, and, in the meantime, other persons obtained the settlement from Government, the original settlement holders having failed to find the requisite security. The order of the collector on the 16th of May, on the complaint made to him, was "that if it should appear on inquiry that some portions of the lands of this mehal" (i.e. *Bhawanundpore*), "which were settled, have been taken possession of by the proprietors of *Ishakpore*, then, after settlement of the question, the said portions of lands and jumma can be deducted, and that they should at present submit a kabuliyat." The proceedings which followed are stated with considerable detail in the judgments of the Subordinate Judge and the High Court, and may be now briefly noticed. By an order proceeding from the Collectorate of zillah *Monghyr*, two amins were sent to the spot, who, on a date prior to the 12th of March, 1869, measured the lands of which the owners of *Ishakpore* had taken possession; and again delay occurred before the Collector personally took up

the subject of the disputed lands. In June, 1870, however, the matter was taken up and investigated by Mr. *Lyall*, the Collector, who in the rubokari of the Collectorate, dated the 16th of June, 1870, after narrating the proceedings which had previously taken place, states: "This year, the papers on the record of this case were sent to this Court under the rubokari of the Collector for measurement, test and inquiry into the rate, and settlement of the boundary disputes;" and he thereupon goes on to say that he went to the mehal and tested the measurement, and found it to be correct. He adds that, "after the necessary inquiries and settlement of the disputed land, a detail of which is given in the English judgment, dated the 25th of February, 1870," he made a settlement for ten years. While, in a subsequent passage of the rubokari, which deals with the detailed measurements of lands under the heading "The determination and inquiry made by the settlement officer regarding the same," occurs this passage: "Accordingly, for the reasons assigned in the judgment in English, dated the 25th of February, 1870, the entire quantity of land, the subject-matter of the dispute which was between (the proprietors) of mouzah *Mahadeo Simeria*, *Ishakpore* and *Siswa*, is excluded from this mehal," &c. If the judgment of the 25th of February, 1870, had been produced, it would probably have thrown light upon the posting of the bullas. It is not in the record; but there is enough in the other papers produced to shew that the land excluded from *Bhawanundpore* was that of which the lessees of the Government complained in 1868 that it had been taken by the maliks of *Ishakpore*. From that time till 1883, when the present suit was instituted, the lands in question have been treated alike by the Government authorities and by the Defendants as part of the Defendants' mouzah of *Ishakpore*, and not as belonging to the Government mouzah at *Bhawanundpore*.

The question remains, what is the legal effect of these proceedings extending over so long a course of time? The Appellants maintain that these proceedings shall have no effect in reference to the settlement of the disputed questions of property which have arisen between the parties, either in the suit of 1862 or in the present case. Their Lordships cannot assent to this

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view. If the question were one of limitation, the possession of the Defendants for a period of twelve years, though it would be sufficient to bar a claim by any other party, would not exclude a claim by the Crown to recover what could be shewn to be Government property. The question raised, however, is not one of limitation. The possession given and taken, and retained for so long a period, and in the circumstances stated, is used by the Defendants not to make a title, but to define the land which the decree in the action of 1862, followed by the execution order, gave them. The decree gave the Defendants the lands they claimed in the suit, and then in the possession of the Appellants. It did not contain specific boundaries; but the acts of the parties immediately after the decree are very important to fix the meaning of indefinite terms in the decree. And when we find that the *Ishakpore* party took possession within a few days of the peon's visit, ostensibly under the nazir's authority, as the petition of *Gundur Singh* shews; and that the *Bhawanundpore* party complained to the Collector; and that the Collector supported the action of the *Ishakpore* party, there is very strong reason to infer that the possession taken was rightfully taken in execution of the decree. It is true the proceedings were not those of a civil Court. Had they been so, it would not have been possible to maintain the present suit. But the proceedings were taken before the revenue authorities, whose duty it was to fix the right boundaries for revenue purposes. It is not suggested that these officials acted otherwise than honestly. The argument submitted by the Appellants' counsel was that the officials erred or were misled, that the Government amin too readily accepted the boundaries shewn to him as covered by the decree, and that the Collector merely adopted what the amin had reported without any sufficient independent inquiry. Their Lordships can see no sufficient ground for any such inference in the documents and other evidence adduced. They will humbly advise Her Majesty that the appeal should be dismissed, and the judgment of the High Court affirmed. The appeal having been argued *ex parte*, their Lordships make no order as to costs.

Solicitor for the Appellant: *Solicitor India Office.*

SARODA PROSUNNO PAUL AND ANOTHER PLAINTIFFS;

AND

SHAMLALL PAUL AND ANOTHER . . . DEFENDANTS.

J. C.*

1892

Feb. 12; *March* 5.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Decree for Possession—Evidence of Title.

In a suit for proprietary possession the Plaintiff deduced a title by inheritance coupled with an allotment to his ancestor of the land in suit by Commissioners of Partition; the Defendant pleaded as to a portion of the land that it had been included in such allotment by mistake of the Commissioners, and that he had derived a title thereto adversely to the Plaintiff:—

Held, that there being no evidence of any error in the allotment, and no evidence of any adverse title in the Defendant, the High Court were in error in modifying a decree for possession of the whole of the land claimed and in measuring off by mere guesswork a portion of it as claimed by the Defendant.

APPEAL from a decree of the High Court (August 16, 1888), in part reversing a decree of the same Court (March 26, 1888) in its original jurisdiction.

The facts are stated in the judgment of their Lordships.

Mayne, for the Appellants.

The Respondents did not appear.

The judgment of their Lordships was delivered by

1892

March 5.

SIR RICHARD COUCH:—

On the 25th of September, 1822, a suit was brought in the Supreme Court of *Calcutta* on the Equity side by *Issar Chunder Paul*, one of the sons of *Roghoo Nauth Paul*, deceased, and *Khetter Chunder Paul*, son and heir of *Tarrachund Paul*, deceased, another son of *Roghoo Nauth*, against the other members of their family, which was an undivided Hindu family, to have the will of *Roghoo Nauth* established and the provisions thereof carried

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, and SIR RICHARD COUCH.

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into effect, and to have a partition of the immoveable estate of *Roghoo Nauth*, subject to the provisions of his will. On the 22nd of April, 1823, by an order of the Supreme Court, Commissioners were appointed to make the partition, with power to examine the parties and their witnesses on oath, and to compel the production of documents. On the 28th of June, 1825, the Commissioners made their report, and thereby certified that they had allotted to *Khetter Chunder Paul*, with other property, a portion of tenanted ground in *Deehee Entally*, called *Sontose's Garden*, containing by admeasurement about four bighas and thirteen cattahs, and included within the boundary-line coloured green in the map of the garden annexed to the report. The map is in existence. There is no doubt that *Khetter Chunder's* allotment, as delineated on the map, does contain four bighas and thirteen cattahs. And there is no question as to the exact position and boundary-line of that allotment.

Khetter Chunder died intestate, and without issue, in 1837, leaving *Pearymoney Dossee* his sole widow and heiress. *Pearymoney* died in 1884, and thereupon *Rye Churn Paul* became the heir of *Khetter Chunder*, and entitled to his estate. In August, 1885, *Rye Churn Paul* brought a suit in the Supreme Court, in its ordinary original civil jurisdiction, against the Respondents for possession of four bighas thirteen cattahs of *Sontose's Garden*, as having been allotted to *Khetter Chunder* by the decree in the partition suit. The plaint alleged that, from the time of the decree down to the time of his death, *Khetter Chunder* was in possession of the piece of land so allotted to him, and that after his death *Pearymoney* had possession for many years, and that the Defendants were then in possession. Besides relying on a Hindu widow's power of alienation in case of necessity, the written statement of *Shamlall*, the real defendant, denied that *Roghoo Nauth* died possessed of the four bighas thirteen cattahs, and alleged that within the land the subject-matter of the suit about one bigha of land, described inaccurately in the conveyance and in a subsequent pattah thereof as sixteen cattahs, had been purchased by *Pearymoney* with her own moneys from one *Shaik Budooroodin*, under a bill of sale dated the 25th of December, 1834, and never was part of the estate of *Roghoo Nauth*.

The main defence failed. But both Courts have dealt with the minor point suggested by *Shamlall*. The learned Judges of the Court of Appeal, differing from the Judge of First Instance, have found or placed within *Khetter Chunder's* allotment *Budooroodin's* sixteen cattahs, now developed into one bigha four cattahs. In order to arrive at this result, they assume a blunder on the part of the Partition Commissioners, and an adverse title to part of the allotment extinguished in 1834 by *Pearymoney's* purchase.

The Defendant *Shamlall* derived his title to the premises under a mortgage granted by *Pearymoney* to one *Lokenauth* on the 7th of August, 1867. The mortgage deed is in English form. It contains two important recitals. In the first place it recites that *Khetter Chunder* "was in his lifetime and at the time of his death seised and possessed," among other property, of the four bighas and thirteen cattahs, formerly called *Sontose's Garden*. That is the piece of land allotted to *Khetter Chunder* on the partition. Then it recites *Budooroodin's* conveyance of the sixteen cattahs. They are described as "adjoining to the said piece or parcel of land measuring four bighas and thirteen cattahs hereinbefore mentioned, and forming together one entire piece or parcel of land measuring five bighas and nine cattahs." The deed proceeds to convey to *Lokenauth* by way of mortgage among other property, "all that piece or parcel of land . . . measuring five bighas and nine chittahs or thereabouts," describing it by its abuttals. Now, the first observation which arises in reference to this deed is this: It is directly at variance with the allegations of the principal Defendant in his written statement. The Defendant alleges that the sixteen cattahs conveyed to *Pearymoney* by *Budooroodin* were within the ambit of the four bighas and thirteen cattahs allotted to *Khetter Chunder*. The mortgage deed shews that they were two distinct properties, adjoining but not intermixed. In the next place it is to be observed that in 1868, when *Rye Churn Paul* brought a suit against *Pearymoney* and *Lokenauth* to impeach *Pearymoney's* dealings with her husband's estate, *Lokenauth* put in a defence on oath, in which he stated that from the title-deeds in his possession he believed that the four bighas and thirteen cattahs, with certain house property, did belong to

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Khetter Chunder in his lifetime; but he alleged that the rest of the property in the mortgage was held under a different title. He said he was not bound to disclose his title to it, and therefore he objected to produce the mortgage deed. He added that on the occasion of the mortgage the title to the property was investigated by his attorney. Nothing could shew more plainly that the theory on which the judgment under appeal proceeds had not been invented in the year 1868.

Lokenauth, suing on his mortgage, obtained a decree for sale in default of payment of the amount due. The land in mortgage was sold under the decree on the 19th of February, 1870. It was bought by one *Modoosoodun Dutt*. On the 1st of December, 1877, *Modoosoodun Dutt* became insolvent. His property was put up for sale in lots by the official assignee. At the auction the Defendant *Sham Lall*, in the name of his son, the co-Defendant, bought lot 2. Lot 2 was conveyed to him by deed dated the 4th of August, 1880. On examining this deed it seems clear that lot 2 is the piece of land allotted to *Khetter Chunder Paul* on the partition, diminished slightly in extent by some encroachments which are noted by Mr. *Cantwell*, who surveyed the property on behalf of the Plaintiff in 1888. Lot 2 is described as "containing by estimation four bighas and three chittahs, and thirteen square feet, more or less." The record is silent as to the other lots, among which *Budooroodin's* sixteen cattahs, if they exist, might not improbably be found. But it would, in their Lordships' opinion, be an unprofitable task to inquire what has become of these sixteen cattahs, and what is their precise situation. The Plaintiff does not claim them. The Defendant *Shamall* has not connected himself with them by any document of title or anything that can be described as evidence.

Under these circumstances, Mr. Justice *Trevelyan*, who heard the case in the first instance, was "satisfied that the land in dispute belonged—the whole of it—to *Khetter Chunder Paul*," and he made a decree to the effect that possession of the premises should be delivered to the Plaintiff.

The Defendant *Shamlall* appealed to the High Court in its appellate jurisdiction. The learned Judges who heard the appeal have modified the decree of the Lower Court by excluding from

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it one bigha and four cattahs, as representing *Budooroodin's* sixteen cattahs, measured off in a position determined apparently by mere guesswork.

Their Lordships are of opinion that there is no ground for assuming that the members of *Roghoo Nauth's* family, who were parties to the suit for partition, were under any mistake as to the property which belonged to their father, or that there was any error or want of due care on the part of the Commissioners (whose proceedings appear to their Lordships to have been perfectly regular), or that there was ever any adverse claim to any part of the land allotted to *Khetter Chunder Paul.*

Their Lordships think the title of the Plaintiff to the land claimed in the plaint was proved, and they will humbly advise Her Majesty to affirm the decree of Mr. Justice *Trevelyan,* to reverse the decree of the Appellate Court, and to order the appeal to it to be dismissed with costs. The Respondent, *Shamlall Paul,* will pay the costs of this appeal.

Solicitors for the Appellants: *Wrentmore & Swinhoe.*

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Feb. 5; *March* 5.

SRIMATI RANI HURRIPRIA . . . . . DEFENDANT;

AND

RUKMINI DEBI . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Secondary Evidence—Search for Original Document—Discretion of the Judge.

Where the Subordinate Judge finds that there has not been such an amount of search for an original document as to justify the Court in admitting a copy:—

Held, that this is a point proper to be decided by the Judge of First Instance, and depending very much on his discretion, and that his decision should not be overruled except in a very clear case of miscarriage.

APPEAL from a decree of the High Court (Feb. 21, 1889), affirming a decree of the Subordinate Judge of *Midnapore* (March 29, 1888).

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD HANNEN, and SIR RICHARD COUCH.

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The facts are stated in the judgment of their Lordships.

Doyne, and *Hunter*, for the Appellant.

Mayne, and *Branson*, for the Respondent.

[The *Indian Evidence Act*, sect. 6, was referred to.]

1892

March 5.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

On the 5th of January, 1871, Rajah *Koer Narain Roy* died without male issue, leaving a widow, the Appellant *Hurripria*, who is Defendant in this suit, and two daughters, one of whom is *Rukmini*, the Respondent and Plaintiff in the suit. *Hurripria*, therefore, is his heir, and the two daughters are the reversionary heirs apparent.

On the 23rd of April, 1882, the Defendant adopted a son to her husband, alleging that she had authority to do so by virtue of an anumati-patra, or power, executed by the Rajah on the 4th of January, 1871.

In March, 1887, the Plaintiff brought this suit, alleging that the Defendant had no authority to adopt, and praying for a declaration that the adoption made by her is contrary to law and invalid. Setting aside an objection for want of parties which was rightly decided in the Plaintiff's favour, the defence rested on the ground that the Rajah gave a lawful authority to make the adoption which was made. That has been decided against the Defendant, on the ground that her proof is defective.

The original document said to have been executed by the Rajah is not forthcoming. The Defendant sought to prove that it had been lost, and tendered what she alleged to be a copy. The Subordinate Judge considered that there had not been any such amount of search for the original as would justify the Court in admitting a copy, and therefore, there being no evidence of the power, he gave the Plaintiff a decree.

The Defendant appealed. The rejected document was added to the record, where it stands as Exhibit 9. The High Court held that the evidence did not shew that it was a copy of any document to which the witnesses deposed as having been executed

by the Rajah; and on that ground, and also because they agreed with the Subordinate Judge that there had been no sufficient proof of search for or loss of the original, they dismissed the appeal. The present appeal is from that decree.

There is some evidence that the day before his death the Rajah signed and gave to *Hurripria* an anumati-patra to take a son in adoption. After his death a cousin named *Gojendra* applied to the Civil Court for an administration certificate, and the Defendant resisted that application. In that proceeding a document, of which Exhibit 9 is alleged to be a copy, was filed by *Biswa Nath*, the Defendant's general mokhtar, on the 20th of February, 1871, and was taken back again by him on the 5th of May, 1871. It is stated that he promised to return it to the Defendant's office, but never did so. He died in March, 1883. After that the search was made, the sufficiency of which is in dispute.

The evidence to prove a sufficient search has been subjected to a very careful and minute criticism at the Bar. Their Lordships will make only one remark on it. The point is one which is proper to be decided by the Judge of First Instance, and is treated as depending very much on his discretion. His conclusion should not be overruled except in a very clear case of miscarriage. But the evidence here is very far indeed from raising a case for overruling the Subordinate Judge, even if his judgment had not been supported, as it has been, by the Appellate Court.

That would be sufficient to dispose of the appeal on the first point; but the evidence on the second point is such as to lead their Lordships to express a clear opinion that the High Court have decided it rightly. The original document in question was not registered, and, though filed in the certificate case, it was not proved. Exhibit 9 purports to be the copy of a document filed on the 23rd of January, 1871, and to be issued on the 24th of February, 1871, with the signatures of *Khetter Mohun Jana*, and of *Mohendra Nath Ghose*, the Serishtadar of the *Midnapore* Court, and it bears the seal of that Court. That is the whole evidence to prove it, and in effect the Defendant claims that the document shall furnish its own proof. No evidence is produced to shew how, by whom, or at whose instance the copy was made, or how

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it came to be in the Defendant's hands; and, what is more important, no evidence to shew that any one compared it with the original. The only witness who speaks to the execution of the power is *Dhurjati*, who was the Rajah's record keeper in 1871. He says that *Madhub*, the Rajah's dewan, had prepared a draft; that, at the request of the Rajah, he read it out in the presence of many witnesses; that it was then copied fair by *Soonder Narain*, the Rajah's seha-nuvis, writing from *Madhub's* dictation; was witnessed, and kept by the Rajah. Of the contents he only tells us that it was a power for the Rani to adopt a son, and that his daughters were to receive Rs.2 per day for maintenance—a provision which does appear in Exhibit 9. He mentions eight attesting witnesses. Of these witnesses three are dead; but the other five would appear to have been living when the evidence was taken. One of them is *Soonder Narain*, the scribe who wrote the fair copy; another is *Raghabanund*, the father of the Defendant, another is a brother of the Defendant's co-wife, by name *Trilochun*, in whose presence she states that the Rajah gave the power into her hands. Not one of the attesting witnesses is called. So that there is not an attempt to identify Exhibit 9 as being a copy of that document which *Dhurjati* tells us the Rajah executed formally; and there is, therefore, no evidence at all, beyond his vague statement, from which a Court of Justice can gather its contents.

The suit wholly fails, and the appeal must be dismissed with costs. Their Lordships will humbly advise Her Majesty accordingly.

Solicitors for appellant: *Neish & Howell.*
Solicitors for respondent: *Barrow & Rogers.*

NAWAB SAHIB MIRZA AND OTHERS . . DEFENDANTS;

AND

MUSSAMMAT UMDA KHANAM . . . PLAINTIFF.

NAWAB SAHIB MIRZA AND OTHERS . . DEFENDANTS;

AND

MUSSAMMAT GUNNA KHANAM . . . PLAINTIFF.

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Feb. 9; March 5.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Revocation of Will—Evidence—Onus probandi—Construction of Will—Demonstrative Legacies.

A duly executed will is not to be treated as revoked, either wholly or partially, by a will which is not forthcoming, unless it is proved that the later will contained a revocation expressed or necessarily implied, the burden of proof to that effect being on the person who challenges the earlier will.

Payment of certain legacies being resisted on the ground that the testatrix had no disposing power over the fund out of which she directed them to be paid:—

Held, that, on a consideration of the whole will, the clause in question could not be restricted to such fund, but extended to the whole moveable estate of the testatrix. Otherwise the legacies were demonstrative, and on failure of the particular fund named were payable out of the general estate.

CONSOLIDATED appeal from a decree of the Judicial Commissioner (Feb. 9, 1888), reversing a decree of the District Judge of *Lucknow* (March 28, 1887), and restoring a decree of the Subordinate Judge of *Lucknow* (Nov. 1, 1886).

The facts are stated in the judgment of their Lordships.

As to the second will in 1876, the Subordinate Judge observed that it had not been produced, nor had it been proved that it had been duly executed, the probability being that it had not been executed, for in that case the testatrix would surely have withdrawn the will of 1860 from the wasika officer, or had it otherwise set aside. That there was not anything in the will of 1860

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to indicate that it was made for a temporary purpose only, that its fulfilment did not depend solely on her returning from her pilgrimage, that it was not a conditional will. As to the validity of the prior will, the Court held that she could not make a devise out of the wasika, but there were other properties from which the stipends were to be paid, and these were not affected by Act XXIII. of 1871.

That from the 3rd and 5th clauses of the will, the pension of Rs.4500, which the testatrix drew at one time, and which was discontinued in 1873, seemed to be included. *Nawab Malka Jehan*, however, had several lakhs of rupees in Government Promissory Notes, a very large proportion of which came into the Appellants' possession as heirs, and that therefore the discontinuance of the pension did not deprive the Plaintiffs of their right to the stipends claimed, nor was it a revocation of the will, nor was the will revoked by the subsequent large gifts above mentioned. The Court therefore held that Plaintiffs were entitled to their stipends out of all moveables of the testatrix inherited by the Defendants. The word "etcetera" in the 5th clause was comprehensive enough to include all moveables.

The District Judge held that the covering letter of the testatrix, dated the 6th of December, 1876, sending the second will to the Commissioner, shewed that the terms of the new will differed from those of the will of 1860, that *Sahib Mirza* was appointed executor in the place of the Chief Commissioner, and a poor-house was provided for, that she had revoked her will of 1860, and had drawn up a new one, the distribution of the large sum of Rs.18,500 to some of the legatees of the first will was evidence in support of the revocation, and silence in the letter of the 6th of December, 1876, in regard to the will of 1860, pointed to *Nawab Mulka Jehan* having executed the will of 1860 for a temporary purpose only. The District Judge therefore ordered the Plaintiffs' suits to be dismissed.

The Judicial Commissioner generally concurred in the findings of the Court of first instance. He was of opinion that the correspondence of the Queen with the local authorities in 1876 clearly proved the *animus revocandi*, but it went no further; that, on the contrary, it shewed that the new draft will was then

not finally completed, that it was not registered, though she was expressly recommended by the Government to do so, and so the natural inference was that she laid aside her intention when she found that Government would not assist her; that this conclusion was strengthened by the fact that she did not withdraw her will of 1860 from the wasika office. That this first will was an elaborate document, and there was nothing therein to shew that it had been executed for a temporary purpose only.

Rigby, Q.C., and *C. W. Arathoon*, for the Appellants, contended that this last decision was erroneous, and that the decree of the District Judge should be restored. The preamble of the will of 1860 and its terms generally, the testatrix having made no reference thereto in her correspondence of 1876, and the effect of other acts on her part, shewed that that earlier will was intended to be effective only in case of her death while away from home. The District Judge was right in holding that it was made for a temporary purpose only. It was revoked by the new will of 1876 and the letter of the 6th of December of that year. Otherwise, on the true construction of the will of 1860, it ought to have been held that the intention of clause 5, was to denote the pension which yielded a monthly income and was under Government control, as the source from which the legacies in suit were to be paid, failing which, the legacies would fail. The clause does not relate to other moveables. The ruling that these legacies are payable out of all the moveable property of the testatrix in the Appellants' possession, is erroneous and inconsistent both with the will of 1860 and the *Pensions Act*, 1871. Reference was made to the provisions of Act XXIII. of 1871.

The Respondents did not appear.

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March 5.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The Respondents in these consolidated appeals, who were Plaintiffs in the Court of the Sub-Judge of *Lucknow*, are two servants of the late *Nawab Malka Jehan*, widow of *Mahomed Ali Shah*, King of *Oudh*.

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Nawab Malka Jehan died in the year 1881. Each of the Respondents claimed to be entitled to an annuity or stipend under her will. The annuities are very small in amount; but it is said that there are many other claimants in a similar position, and that the total amount involved in the decision of these appeals is considerable.

The will on which the Respondents founded their claims is dated the 19th of March, 1860. The Appellants, who are heirs of *Nawab Malka Jehan*, as well as residuary legatees under her will, rested their defence on two grounds, both of which were urged at the bar. In the first place, it was said that the will of 1860 was revoked by a will made in 1876. In the next place, assuming the will of 1860 to have become operative, it was contended that, upon the true construction of that will, the annuities were directed to be paid solely and exclusively out of certain funds over which the testatrix had, at the time of her death, no power of disposition.

The Sub-Judge and the Judicial Commissioner were in favour of the Respondents on both points. The District Judge held that the will of 1860 was revoked.

The alleged will of 1876 is not forthcoming. All that is known about it is to be found in a letter addressed by *Nawab Malka Jehan* to the Commissioner of *Lucknow*, and dated the 6th of December, 1876. In that letter, *Nawab Malka Jehan* expressed herself as follows: "I heartily desire that, with your permission and consent, a will in which I have appointed my grandson *Sahib Mirza Bahadur* my executor be formally and with certain conditions executed and ratified, so that in accordance therewith my estate may be managed after my death, in future, with the exception of the arrangement connected with the distribution (of stipends) among my dependents and the establishment of a charitable institution for the benefit of the public in general, the management and administration of which are not possible without the aid of Government." A little further on, she says, "a copy of the will is also forwarded for your inspection." And the letter concludes with this sentence: "In short, this last will and testament of mine, being completed and properly executed, shall after the Government shall have accorded its sanction thereto be

deposited with the Government." No other passage in the letter throws any light upon the subject. No copy or draft of the will referred to in the letter has been produced. Some oral evidence was offered as to its contents, but this evidence was held to be worthless.

The Government, it seems, declined to have anything to do with the matter. *Nawab Malka Jehan* was recommended to deposit her will with the registrar under the *Registration Act*. This advice, however, was not followed.

Considering the terms of the letter of the 6th of December, 1876, it is by no means clear that the will referred to in it was ever executed. The expressions in the letter are, no doubt, consistent with the view of the District Judge that the will was executed before application was made to the Commissioner, but they are not inconsistent with the view of the Sub-Judge and the Judicial Commissioner that the will was not executed at the date of the letter, and that it was not intended to be executed until after the Commissioner's consent had been obtained. There is nothing to shew in what respects the alleged will of 1876 differed from the will of 1860, except that it appears that *Sahib Mirza Bahadur* was named as executor in the later instrument. Nor, indeed, is it possible to determine whether the reference to "the arrangement connected with the distribution of stipends" and "the establishment of a charitable institution" points to dispositions which are found in the will of 1860 and with which the testatrix did not propose to interfere, or to new and perhaps different dispositions contained in the alleged will of 1876.

In these circumstances, and upon these materials, which are the only materials relevant to the question under consideration, their Lordships are of opinion that the proper and necessary conclusion of law is that the will of 1860 was not revoked.

It is well settled that a will duly executed is not to be treated as revoked, either wholly or partially, by a will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the later will contained either words of revocation, or dispositions so inconsistent with the dispositions of the earlier will that the two cannot stand together. It is not enough to shew that the will which is not forthcoming differed from the earlier

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will, if it cannot be shewn in what the difference consisted. It is also settled that the burthen of proof lies upon the person who challenges the will that is in existence. These propositions have been established in this country, both in this tribunal and in the House of Lords: *Cutto* v. *Gilbert* (1); *Hitchins* v. *Bassett* (2); *Goodwright* v. *Harwood* (3); and as they are founded on reason and good sense they must be regarded as of general application.

The only remaining question is as to the true construction of the will of 1860.

That will was made when the testatrix was about to proceed on a pilgrimage to "Holy *Karbala*." *Nawab Malka Jehan*, it seems, was a lady of great wealth. Besides her landed property she was in the enjoyment of wasika allowance of Rs.405 a month, in regard to which no claim is made by the Respondents, a pension of Rs.4500 a month, which was stopped in 1873, and the income of twelve lakhs of rupees which were settled by treaty, and in which, apparently, she had only a life interest. It is, moreover, admitted that at the time of her death her moveable property was worth about Rs.911,166, including Government notes worth about Rs.696,000. The will provides for the management of her affairs during her pilgrimage, as well as for the distribution of her estate after her death. It is addressed to the Chief Commissioner, and invokes the assistance and protection of the Government, under whose supervision the testatrix places her property.

The instrument begins with some general reflections on the duty of a pious Mahomedan to make a will, in order to prevent disorder in his affairs after his death, which seem to shew an intention on the part of the testatrix to dispose of the whole of the property over which she had disposing power.

Clause 3 deals with the application of the income of the testatrix's landed property during her pilgrimage. If there should not be enough in hand from that source to answer the purposes of the will, her agent was to make up the deficiency from "the pensionary allowance and interest on notes, &c., paid

(1) 9 Moo. P. C. 131. (2) 3 Mod. 203; Shower's Rep. by Butt. p. 330.
(3) 2 W. Bl. 937.

from the Treasury," and remit the balance to the testatrix. Pausing there, one can hardly doubt that the testatrix must have intended her agent to remit to her the whole balance of the income of her moveable estate, and not merely the balance of her wasika allowance and pension, and the income of the twelve lakhs. But the only words to carry the income are the words "pensionary allowance and interest on notes, &c., paid from the Treasury." Then the will goes on to provide for the remittance to the testatrix of the income of her landed property when collected.

Clause 5 contains the gift on which the present question turns. In it *Nawab Malka Jehan*, in the event of her death, declares her will as follows:—

"Rs.981 of the Queen's coin, out of my allowance from wasika and notes, &c., shall be paid monthly from the Government treasury to my relations, dependents, and servants as detailed below . . . and the remainder of my allowance from wasika and notes, &c., and the whole of my landed property, *i.e.*, houses and groves, &c., and jagir villages, shall be divided among my grandsons and granddaughters according to their lawful shares, and be paid to the agent of each of them." There, again, in the ultimate disposition, it would appear that the testatrix must have intended to deal with all her moveable property over which she had disposing power.

On consideration of the whole will their Lordships are of opinion that the Sub-Judge and the Judicial Commissioner were right in holding that the annuities or stipends given to the Respondents were payable out of the testatrix's moveable property, which she had power to dispose of by will. Probably the testatrix was under the erroneous impression that she could deal with the wasika allowance, and her pension from Government, and the income of the fund settled by treaty. But their Lordships are of opinion that the words of the gift are large enough to charge the annuities or stipends in question upon the Government notes held by the testatrix, and also upon the rest of her moveable property. They may add that if the words of the will are to be taken in a more restricted sense, it appears to them that the gift of these annuities or stipends must be regarded as

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a demonstrative legacy, and in that view they would be payable out of the testatrix's general estate, in the event of the failure of the particular fund pointed out for their payment.

In the result, therefore, their Lordships are of opinion that the appeals ought to be dismissed, and they will humbly advise Her Majesty accordingly.

Solicitors for Appellants: *T. L. Wilson & Co.*

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INDUR CHUNDER SINGH AND OTHERS . PLAINTIFFS;

AND

RADHAKISHORE GHOSE . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Lessor and Lessee—Renewal by Guardian of Infant Lessee for her own Benefit—Privity of Contract.

In a suit to recover arrears of rent, it appeared that the Defendant was heir to a deceased lessee of the Plaintiffs, and that during his minority his guardians, the mother and widow of the lessee, renewed the lease, and subsequently surrendered it to the Plaintiffs:—

Held, that the Plaintiffs, having failed to shew that the Defendant was either bound by such renewal or had subsequently ratified it, could not convert their suit into one against the estate of the deceased and the Defendant as representing it; and, further, that the renewal was in fact made by the mother and widow for themselves and in their own interest, and did not establish any relation between the Plaintiffs and the estate.

APPEAL from a decree of the High Court (Jan. 10, 1889), reversing a decree of the Subordinate Judge of zillah *Moorshedabad* (Dec. 1, 1886).

The facts are stated in the judgment of their Lordships.

Cowie, Q.C., and *Hunter*, for the Appellants.

Doyne, for the Respondent.

The cases referred to were *Hunooman Persaud Panday* v. *Mus-*

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sumat Babooee Munraj Koonweree (1) and *Waghela Rajsanji* v. *Shekh Masludin* (2).

1892. March 5. The judgment of their Lordships was delivered by

LORD HANNEN:—

In this suit, which was brought in the Court of the Subordinate Judge of *Moorshedabad*, the Plaintiffs claimed arrears of rent in respect of lands originally held for a term of years under the Plaintiffs or their predecessors in title by one *Gopi Mohun Ghose*.

Before the expiration of the lease *Gopi Mohun Ghose* died (February, 1869), leaving no issue. By his will (28th January, 1869) he gave his wife, *Nrityashama Dasi*, power to adopt a son, who was to be entitled to all his property, with an exception not material to this case. The will contained the following clause: "As long as the son begotten of my loins or my adopted son remains a minor and has not attained majority, all the property shall be in the possession of my adorable mother and my wife, as their guardians." In 1870 the widow adopted *Radhakishore Ghose*, the Respondent in this appeal, who only attained his majority on the 9th of June, 1885.

On the death of *Gopi Mohun Ghose* his mother, *Naraini Dasi*, and his widow continued in possession of the lands claimed during the remainder of the term and after its expiration.

On the 7th of September, 1874, they took a fresh lease for five years from the Manager of the Court of Wards then in charge of the Plaintiffs' estates. The lessees therein described themselves respectively as "mother of the late *Gopi Mohun Ghose*" and "mother of the minor adopted son," and they bound themselves to pay the rents reserved, and to pay interest on any arrears.

After the expiration of this term *Naraini Dasi* and *Nrityashama Dasi* continued to hold possession, but on the 13th of April, 1885, two months before the Respondent came of age, *Naraini Dasi* having died, *Nrityashama Dasi* surrendered the lands, and the Appellants accepted the surrender and recovered possession of them. There were at that time three years' arrears of rent,

(1) 6 Moo. Ind. Ap. 393. (2) Law Rep. 14 Ind. Ap. 89.

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which were sought to be recovered in this action against the Respondent personally, and also against his adoptive mother, *Nrityashama Dasi.*

The Subordinate Judge dismissed the suit as against *Nrityashama Dasi*, and against this decision no appeal has been brought, but he held that the present Respondent was liable for the arrears of rent with interest, and costs of suit.

The issues raised were as follows: "Was the ijara by *Naraini* and *Nrityashama Dasi* contracted for the benefit of Defendant No. 1? Was it beneficial to him? Did Defendant No. 2 take the lease on the *bonâ fide* belief that it would be beneficial to him? Is he bound by their acts, and liable for the rent, cesses, and interest claimed?"

The Subordinate Judge decided all these issues in the affirmative, that is, against the present Respondent.

Another question was discussed, though not raised on the pleadings, namely, whether the Respondent, after he attained his majority, ratified or adopted the acts of his adoptive mother and grandmother? The Subordinate Judge held that the Respondent had not adopted or ratified these acts. It was, in fact, proved that the Respondent, on coming of age, repudiated the act of his guardians, and refused to collect rents from the subtenants.

On appeal to the High Court the learned counsel for the Plaintiffs did not contend that the guardian of the minor could bind the minor by contract, but argued that the learned Judge was wrong in not finding that the Respondent had, after he came of age, adopted the contract. On this point the High Court agreed with the Subordinate Judge, and this question of fact must be treated as finally determined.

The contention that the mother and widow of *Gopi Mohun Ghose* had power to bind the minor by contract was abandoned in the Court below, and their Lordships are of opinion that such a contention could not be sustained.

But it was suggested that, under the terms of the will of *Gopi Mohun Ghose*, his mother and widow had power to bind his estate, and had done so, and that the Respondent, having succeeded to that estate, is bound by the act of his adopted mother and grand-

mother as his guardians, done in the *bonâ fide* belief that it was beneficial to the estate.

Their Lordships are of opinion that this is not the claim made by the Plaintiffs' plaint. It does not make any claim against the estate, but makes a personal claim against *Nrityashama Dasi*, and the Respondent whom it states she had adopted. While a liberal construction should be given to pleadings, so as to give effect to their meaning to be collected from their whole tenour, they ought to be expressed with sufficient definiteness to enable the opposite party to understand the case he is called upon to meet, and their Lordships consider that neither in the plaint, nor in the issues which cover a wider ground than the plaint, is the claim made against the estate of the deceased *Gopi Ghose*. Indeed, if it was, and was sustained in that sense by the Subordinate Judge, it is difficult to see why the suit should have been dismissed against the widow and guardian. It is indeed now urged that the suit may be treated as a claim against the estate, and against the heir, to the extent of assets received by him. But there is quite enough in the evidence to shew that a claim so put would raise entirely new issues, both as to the extent of assets received and as to the extent to which the Plaintiffs themselves were responsible for the renewal of the lease, that it would in fact be a new suit, and that it would be improper to allow such a change of case at this period of the litigation.

But, further, their Lordships are of opinion that upon the facts proved the suit, even if treated as one against the Respondent in regard to the estate, cannot be sustained.

The kabulyat executed by the mother and widow of *Gopi Mohun Ghose*, on which the Plaintiffs' claim is founded, does not purport to bind the estate of the deceased. By it the lessees undertake themselves to pay the rents, and interest on any arrears, and to observe the obligations of the lease. The learned Subordinate Judge, while admitting that there is nothing in the lease to shew that it was taken for the benefit of the Respondent, says that that fact is immaterial when it is proved that the lease was really taken for the Respondent, and that the lessees were in possession for his benefit; and he relies on the case of *Hunooman*

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Persaud Panday v. *Mussumat Babooee Munraj Koonweree* (1), as an authority. In that case, however, the managers of an infant's estate were actually dealing by way of mortgage with a portion of that estate, and it was held that the manager might do so in a case of need or for the benefit of the estate, and that the fact that the mortgage contained the inaccurate statement that the mortgagor had a beneficial proprietary right, was immaterial. But in the present case the mother and widow of *Gopi Mohun Ghose* were not dealing with, and did not purport to deal with or affect, his estate, but were incurring new obligations which it is now sought to transfer from them to the estate. It may be that, as between them and the infant, they might be able, in some circumstances, to shew that the estate ought to bear the burden they had taken upon themselves, but that is not the question raised in this case, in which the Plaintiffs seek to establish a direct relation between themselves and the estate of the infant, and a liability on the part of the infant now that he is of age, and of his estate, to fulfil the obligations entered into by the lessees in their own name.

Their Lordships are of opinion that this contention cannot be supported, and that the judgment appealed from, reversing that of the Subordinate Judge, should be affirmed with costs, and they will humbly advise Her Majesty accordingly.

Solicitors for the Appellants: *Barrow & Rogers.*

Solicitors for the Respondent: *T. L. Wilson & Co.*

(1) 6 Moo. Ind. Ap. 393.

OMRAO BEGUM AND ANOTHER . . . . PLAINTIFFS;

AND

SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . DEFENDANT.

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March 10, 11.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Nawab Nazim's Debts Act, 1873—*Award of Commissioners—Claim by an Annuitant.*

In a suit against the Government to recover an annuity with arrears, on the ground that the Government held property of the late Nawab Nazim on which the annuity was charged :—

Held, that, according to the true construction of the *Nawab Nazim's Debts Act*, 1873, an award of the Commissioners thereunder to the effect that the property in suit was free from the said charge was binding and conclusive :

Held, further, that no charge had been created, the documents relied upon not disclosing an intention so to do.

APPEAL from a decree of the High Court (July 10, 1889), affirming a decree of the District Judge of *Moorshedabad* (April 24, 1888), which dismissed the Appellants' suit.

The facts are stated in the judgment of their Lordships.

The District Judge dismissed the suit, as in his opinion the awards of the Commissioners appointed under the *Nawab Nazim's Debts Act*, XVII. of 1873, were a bar to the maintenance of the present suit, and "operated to make it *res judicata*" within the provisions of sect. 13 of the Code of Civil Procedure. And he was of opinion that that Act had not become "obsolete" by reason of the death of Nawab Nazim *Mansur Ali* before the bringing of the present suit.

The High Court expressed no opinion on the effect of those awards, but dismissed the appeal on the grounds that the Plaintiffs had failed to prove "that the estate of the Nawab is so vested in the Secretary of State, that he is personally responsible for the annuity," and that, assuming that matter proved, the suit

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was not maintainable under the 11th section of the *Nawab Nizam's Debts Act*, because the consent of the Governor-General in Council required by that section to the commencement of this suit, which was one to enforce a charge created by the Nawab, had not been obtained.

Doyne, for the Appellants, submitted that sect. 11 of the Act of 1873 did not apply after the death of the Nawab Nazim, and that the consent of the Court to this suit was unnecessary. The *Nawab Nazim's Act* died with the Nawab. The basis of the Appellants' claim is a judgment of the Privy Council (1). The High Court erred in holding that the Nawab Nizam's estate was not liable in the hands of the Respondent to satisfy the Appellants' legal claims under the perwana of the 25th of February, 1858. Their rights under the contract between their father and the Nawab Nazim should have been declared and given effect to. The District Court, moreover, was wrong in holding that the Commissioners did not act *ultrà vires*. They awarded that the Appellants had no right as claimed in this suit, and that *Gopinathpore* was held by the Court to uphold the Nawab Nazim's dignity, and that it was not answerable for the Appellants' claim. The District Court was wrong also in holding that the award had the effect of a decree within the meaning of the Code of Civil Procedure, sect. 13, and in ruling in effect that the Appellants thereby lost the benefit of decrees obtained by them in their suit of 1870, and of the Privy Council decision in 1875, as to the reciprocal rights of the parties to that suit. The Commissioners went beyond their powers in deciding upon the claim to the extent they did; only the question of arrears was before them. Reference was made to *Omrao Begum* v. *Government of India* (2); *Nawab Nazim* v. *Omrao Begum* (3); *Omrao Begum* v. *Commissioners* (4).

Robinson, Q.C., and *Branson*, were not called upon, unless they desired to have the judgment of the High Court maintained upon the particular ground assigned by that Court:

(1) 24 Suth. W. R. 28, P. C. in 1875.
(2) Law Rep. 10 Ind. Ap. 39.
(3) 21 Suth. W. R. 59.
(4) 24 Suth. W. R. 394.

1892. March 11. The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—

The Appellants, who were Plaintiffs in the suit, claim to be entitled to seven-eighths of a perpetual annuity of Rs.600 a month, which was granted in 1858 to their father, *Syed Mehdi Ali*, by the late Nawab Nazim, *Syed Mansur Ali*. They now demand payment of the annuity with arrears from the Government of *India*, on the ground that the Government holds property on which, as they allege, the annuity was, and is, charged.

If the claim were well founded, the charge would apparently extend to all the immoveable property of the Nawab, or at least to all the immoveable property belonging to him which he had power to alienate. But for the purposes of this suit the Plaintiffs limit their claim to pergunnah *Gopinathpore*. That pergunnah was the property of the Nawab in 1858, when the annuity was granted, and it is now held by the Government. The Government holds it "for the purpose of upholding the dignity of the Nawab Nazim for the time being," under the award of certain Commissioners appointed in pursuance of the *Nawab Nazim's Debts Act*, 1873.

Although their Lordships propose to rest their judgment mainly upon another ground, it appears to them that the award under which the Government holds the property would be an answer to the present demand, even if the Plaintiffs' claim had been well founded originally.

It seems that the affairs of the Nawab had got into a state of hopeless confusion. He was involved in debts and liabilities which he could not meet. The Government intervened, laid hands on his property, and passed the Act of 1873 for his relief. All persons having claims against the Nawab or his property were required to notify them within a limited time to certain Commissioners appointed under the Act. Every debt or liability not so notified was to be barred. The Commissioners were empowered, "after due and full inquiry," to determine and certify the amount which, on the consideration of all the circumstances, they might "consider each claimant ought in fairness and justice to receive." On payment or tender by the Government of the

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amount certified, the debt or liability was to be extinguished. No suit was to be commenced or prosecuted, and no process was to be sued for, against the person or property of the Nawab, without the consent of the Government; and, lastly, the Commissioners were to ascertain what immoveable property was held by the Government for the purpose of upholding the dignity of the Nawab Nazim for the time being. They were to certify the particulars, and it was declared that "their finding thereon" should "be binding and conclusive on all persons whomsoever."

Complying with the exigency of the Act of 1873, the Plaintiffs brought in their claim. The Commissioners rejected it altogether. They held that if there was a contract it was "not binding on the Nawab Nazim either for past years or for the future." They made an award finding that the acquisition by the Nawab of certain specified property, including *Gopinathpore*, was, to use their own words, "so to speak official, and that it became an appanage of the office and state of the Nawab Nazim." They held that he was incapable of alienating his interest in such property. And in the terms of the Act, they declared that it was "held by the Government of *India* for the purpose of upholding the dignity of the Nawab Nazim for the time being."

Their Lordships understand that finding applied to *Gopinathpore* to be that *Gopinathpore* is held by the Government for the purposes declared in the Act, freed and discharged from all claims and incumbrances, including the alleged claim or incumbrance of the Plaintiffs. Such a finding, in their Lordships' opinion, was within the competence of the Commissioners, and if so, it was, in the words of the Act, "binding and conclusive on all persons whomsoever."

The learned counsel for the Appellants commented severely upon the manner in which the Commissioners discharged their functions. He insisted that they had misunderstood or disregarded the opinion of this tribunal, which certainly had held that the Nawab was bound by contract to pay the annuity in question to *Syed Mehdi Ali*. But their Lordships have no power to review the findings of the Commissioners, nor is it within their province to express any opinion upon their conduct. The Commissioners were invested with arbitrary powers. If they used

those powers harshly, or otherwise than in accordance with the principles of fairness and justice to which they were required by the Act to conform, the only remedy open to persons who might conceive themselves aggrieved was to appeal to Government. The Government had the power of removing the Commissioners or permitting recourse to be had to Courts of Justice.

The Plaintiffs, it seems, did apply to the Government for leave to enforce a decree of the High Court for payment of arrears of their annuity. This application, however, was refused. Thus through the action of the Government the Plaintiffs were deprived of legal rights which had been recognised by this Board, and successfully vindicated in the highest Court in India, while at the same time the property renounced in consideration of those rights was placed for ever beyond their reach.

Passing from the consideration of the Act of 1873 and the findings of the Commissioners, their Lordships will now direct their attention to the terms of the contract which was made between the Nawab Nazim and *Syed Mehdi Ali*, and which is the foundation of the Plaintiffs' claim. In January, 1858, *Amirunnissa*, the widow of a former Nawab Nazim, died without issue. She was a lady of great wealth and the proprietor of *Gopinathpore*, which she had purchased in the name of *Syed Mehdi Ali*. On her death the Nawab claimed to succeed to all her property to the exclusion of her heirs, of whom *Syed Mehdi Ali* was one. Not caring at the time to dispute the matter with the Nawab, *Syed Mehdi Ali* approached him with a petition, dated the 12th of February, 1858, admitting in terms the Nawab's claim, and soliciting from him an allowance for maintenance. Thereupon the Nawab passed the following order: "Out of the properties, mehals, and zemindaris of the *Begum Sahiba*, deceased, let a monthly allowance Rs.600, besides the sum given in the report, be fixed for *Syed Mehdi Ali*, and nothing further shall be allowed to him by the Sircar at any time or in any way."

Then after about a fortnight's interval, during which, no doubt, communications passed between the parties, *Syed Mehdi Ali* executed a ladavinama, or agreement of disclaimer, dated the 24th of February, 1858, in which in the most unqualified terms he renounced every claim and all pretension to the property

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of the late Begum. Thereupon the Nawab executed the following perwana:—"The late *Nawab Amirunnissa Begum*, deceased, my grandmother, adopted you as her son, and maintained and supported you, and she died on the 21st of January, 1858. After the death of the deceased, you along with your children and dependents appeared before me, and made application for support and maintenance from the sirkar. Consequently for the purpose of your support and maintenance, posterity after posterity, and generation after generation, the sum of Co.'s Rs.600 per mensem, being the annual sum of Co.'s Rs.7200 will be paid to you out of the tehbil of the sirkari mehals. You and your heirs shall be supported and maintained one after another out of the said stipend. It is incumbent on you never to prove faithless to the sirkar. And as for the expenditure of the ten days of the Mohurrum connected with you, mehal *Nimgram*, lying in pergunnah *Bhalul*, a mehal in the name of *Zahurah Begum*, is granted by the Government." That document is dated the 25th of February, 1858.

The learned counsel for the Appellants contended that the four documents are parts of one transaction. That is perfectly clear. But it is equally clear that the first set, the two documents of the 12th of February, are introductory to the second set, the documents of the 24th and 25th of February, which were intended to be the operative and governing instruments. Even if the matter rested on the order of the 12th of February, their Lordships would be prepared to hold that no charge was created on any part of the Nawab's property. It is not a legal charge. In equity no charge can be created unless there is an intent to charge. Taking all the documents together, it is plain that no charge was contemplated by either party. The order of the 12th of February is, in their Lordships' opinion, nothing more than a mandate by the Nawab Nazim to his own officials for their convenience. The perwana of the 25th of February, 1858, does not even purport to charge any property. It simply says that the amount is to be paid out of the Nawab's State Treasury.

Upon these grounds, and especially upon the last, which goes to the very root of the matter, their Lordships hold that the

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appeal must fail. They express no opinion as to the particular ground on which the High Court rested their judgment. They would not have been prepared to have concurred in that view without further argument.

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed. But having regard to all the circumstances their Lordships do not think fit to make any order as to costs.

Solicitors for the Appellants: *Wrentmore & Swinhoe.*
Solicitor for the Respondent: *Solicitor India Office.*

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BIRESWAR MOOKERJI AND OTHERS . . APPELLANTS;

AND

ARDHA CHUNDER ROY CHOWDHRY (PLAINTIFF) AND OTHERS . . . . . RESPONDENTS.

SHIB CHUNDER ROY (DEFENDANT) . . APPELLANT;

AND

GOBIND MOHINI DEBI (PLAINTIFF) AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Adoption—Gift and acceptance of Child—Will—Construction—Invalidly adopted Son takes as persona designata.

There being concurrent findings by the Courts below that although the ceremonies of adoption had been performed there had not been an actual gift and acceptance of the child:—

Held, that the adoption was invalid.

Where a testator clearly indicated his intention before making an adoption, to give the greater portion of his property to the child to be adopted, the bequest being by name, and not dependent upon the adoption, but appearing from the terms of the will to have been made for reasons independent of the adoption though likely to lead to it:—

Held, that although the adoption was invalid, the bequest was effectual.

TWO appeals from a decree of the High Court (May 21, 1886), which substantially affirmed a decree of the Subordinate Judge of the 24 Pergunnahs (Jan. 9, 1884).

* *Present:*—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD HANNEN, and SIR RICHARD COUCH.

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The litigation related to the property of a family claiming descent from one *Gouri Churn Chowdhry*, who died in the Bengali year 1207 (1800–1 A.D.).

The facts are stated in the judgment of their Lordships.

There were two suits, one of which was brought by *Gobind-Mohini Debi*, and the other by *Ardha Chunder Roy Chowdhry* for the purpose of ascertaining the rights of the parties in the property in suit and consequential relief.

Gouri Churn's estate vested, in the events which had happened, in the representatives of four of his sons. The main questions in the appeal related to the rights, *inter se*, of the descendants of two out of these four sons, viz., *Prankrishna* and *Radha Krishna*. Those questions were, first, as to the validity of the adoption of *Ardha Chunder*, one of *Radha Krishna's* two sons, by *Juggut Chunder*, a son of *Prankrishna*; second, in case of the invalidity of such adoption, whether he took, in addition to a moiety of his natural father's estate by inheritance, certain rights by bequest as a *persona designata* under *Juggut Chunder's* will; third, whether in that case he was put to his election.

Both Courts below found as a fact that there had been no gift and acceptance, and that the alleged adoption was invalid. With regard to the construction of *Juggut Chunder's* will the Subordinate Judge was of opinion that the testator intended an absolute gift in favour of *Ardha Chunder*, and not that it should be contingent on his being an adopted son; but that the absolute estate so granted was, "defeasible in the contingency of his not leaving a male issue at the time of his death," but that the latter question might be left for final determination till the happening of that contingency.

The result was that the Subordinate Judge, by his decree, declared the adoption of *Ardha Chunder* by *Juggut Chunder* invalid, and that he was therefore entitled, by right of inheritance, to half of *Radha Krishna's* estate, and was further entitled, under the will of *Juggut Chunder*, to the share specified therein subject to the terms thereof.

The High Court concurred with the first Court, and held that *Ardha Chunder*, though not validly adopted, took an absolute estate of inheritance under the will of *Juggut Chunder*, as a

designated person, but that the absolute estate thereby given was defeasible upon his dying without leaving a son, which the High Court construed to mean a male descendant in the male line.

Cowie, Q.C., and *Branson*, for the Appellants in the first appeal, the grandsons of *Juggut Chunder*, contended that as *Ardha Chunder's* adoption was found to be invalid, his interest was limited to that which he derived by inheritance as one of the sons of *Radha Krishna*. He took nothing by inheritance from *Juggut Chunder*, and under the will of the last named it ought to have been held that he took nothing, for on its true construction the gift was to him as adopted son, and that as he did not answer that description the gift failed. The High Court relied upon the authority of *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (1). It was contended that that case ought to be distinguished in favour of the Appellants as in *Fanindra Deb Raikat* v. *Rajeswar Dass* (2).

C. W. Arathoon, for the Appellant *Shib Chunder*, contended that *Ardha Chunder's* adoption was not invalidated. There had been a sufficient gift and acceptance before the ceremonies and during the lifetime of *Radha Krishna*. There was evidence of an acknowledgment of gift by *Radha Krishna* at the date of his death, which shews that he considered that he had made it effectively. There was evidence also that *Juggut Chunder* and others of the family had treated *Ardha Chunder* as an adopted son, that he was brought up as such, and that *Juggut Chunder's* will recited the gift. Having regard to the circumstance that this was the adoption within a joint family by one brother of another brother's son, the evidence of gift and acceptance was sufficient. He referred to *Venkata* v. *Subhadra* (3); *Atmaram* v. *Madho Rao* (4). Further, the bequest of *Juggut Chunder's* property to *Ardha Chunder's* son was made on the understanding as expressed in the will that *Radha Krishna's* share "had been obtained by *Shib Chunder*." That condition was violated if

(1) Law Rep. 3 Ind. Ap. 253.
(2) Law Rep. 12 Ind. Ap. 72.
(3) Ind. L. R. 7 Madras, 548.
(4) Ind. L. R. 6 Allah. 276.

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Ardha Chunder took a moiety of *Radha Krishna's* estate. He ought, therefore, to be put to his election: see *Codrington* v. *Codrington* (1).

Sir *H. Davey*, Q.C., *Doyne*, and *Mayne*, for the Respondent, *Ardha Chunder*.

Cowell, for the Respondents, *Gobind Mohini*, and *Bama Soondari*.

1892. March 5. The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The first three Appellants in the first of these appeals—*Bireswar Mookerji*, *Sureswar Mookerji*, and *Shib Pershab Banerji*—are the grandsons of *Juggut Chunder Roy Chowdhry*, who died on the 19th of October, 1869. He left two daughters, one, *Hemangini*, the mother of the first two grandsons, and the other, *Ushamoyi*, the mother of the third. The other two Appellants are the daughters' husbands and guardians of their sons. The Respondents, *Ardha Chunder* and *Shib Chunder*, are the sons of *Radha Krishna*, an uncle of *Juggut Chunder*, who died in August 1865. The third Respondent, *Bama Soondari*, is the widow of *Tejas Chunder*, the son of *Gopi Krishna*, another uncle of *Juggut Chunder*, and the Respondent *Gobind Mohini* is the widow of *Sri Krishna*, another uncle. *Pran Krishna*, the father of *Juggut Chunder*, *Gopi Krishna*, *Radha Krishna*, and *Sri Krishna* were four of the sons of *Joygopal Roy*, who died in 1826–27. He left three other sons who all died before *Juggut Chunder*, and their shares in his property became vested in the four sons above named.

One of the suits, which are the subjects of the first of these appeals, was brought by *Ardha Chunder* against *Shib Chunder* and the other persons who are parties to the appeal, and also against *Kadumbini*, the widow of *Juggut Chunder*, and *Horendra*, his granddaughter, the sister of *Bireswar* and *Sureswar*.

The plaint stated that *Juggut Chunder* adopted the Plaintiff *Ardha Chunder* as his son in the year 1273—April 1866 to April 1867—and made a will on the 13th Bhadro 1275—27th August,

(1) Law Rep. 7 H. L. 854.

1868, by which, after giving legacies and monthly stipends to some persons, he bequeathed all his remaining properties moveable and immoveable to the Plaintiff. The plaint also stated that, as one of the sons of *Radha Krishna*, *Ardha Chunder* was entitled to $\frac{8}{60}$th parts, and as devisee under *Juggut Chunder's* will to $\frac{19}{60}$th parts, in all to $\frac{27}{60}$th parts of the joint estate, and it prayed that the will of *Juggut Chunder* might be construed, and a declaration made as to what provisions in it are valid, and of the rights of the Plaintiff and Defendants in the estate left by *Juggut Chunder*. It also prayed that the questions whether the Plaintiff being the son of *Radha Krishna* was entitled to a moiety of the share of the estate left by him, and whether the Plaintiff was the legally adopted son of *Juggut Chunder*, might be determined. Other consequent declarations and directions were asked for, but they need not be stated. At the settlement of issues ten were recorded, but of these only the fourth and fifth have to be considered in this appeal. The fourth is, "Is it a fact that Plaintiff is the legally *dattak* (adopted) son of *Juggut Chunder*?" The fifth is, "Has Plaintiff any interest under the will of *Juggut Chunder*? If so, what is the nature of that interest?"

At the hearing before their Lordships the learned counsel for *Ardha Chunder* did not rely upon the adoption. It was contrary to *Ardha Chunder's* interest to do so, as *Shib Chunder*, his natural brother, in his written statement, alleged that *Ardha Chunder* being the legally adopted son of *Juggut Chunder* had no right and share in the estate left by his natural father *Radha Krishna*. It was contended by Mr. *Arathoon*, who appeared for *Shib Chunder*, that the adoption was valid, and this question had better be first determined.

The Subordinate Judge, after observing in his judgment upon the evidence of what took place before the death of *Radha Krishna*, and afterwards when *Juggut Chunder* performed a grand ceremony of adoption, held that the adoption was invalid, on the ground that there was no giving and taking. The High Court on appeal, after also observing fully upon the evidence, came to the conclusion that there was no gift and acceptance in *Radha Krishna's* lifetime, and no giver, in a legal sense at any

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rate (his widow being mentally incapable), when the ceremony was performed. Their Lordships see no reason to depart from the ordinary rule where there are concurrent findings of fact, and therefore decide that there was no adoption.

Mr. *Arathoon* also contended that in this case *Ardha Chunder* should be put to his election, relying on the following passage in *Juggut Chunder's* will: "And the share of annas 4–5–1 which the late *Radha Krishna Roy Chowdhry* had in the same way, has been obtained by his son, *Shib Chunder Roy Chowdhry*." This occurs in a paragraph of the will, in which the testator states the devolution of the property of his paternal grandfather. No case of election arises here. The testator had no power to dispose of *Radha Krishna's* share, and did not intend to do so.

There remains the question of the effect of the will. Clause 4, which contains the bequest to *Ardha Chunder*, begins: "Having no son, I loved and supported *Ardha Chunder Roy Chowdhry*, the youngest son of the late *Radha Krishna Roy Chowdhry*, as my son. And as the said boy was very attached to me and my wife, and was an object of affection to us, I had a mind, granting to my daughters and daughters' sons a proper portion of my share of the ancestral property and self-acquired property, to give the remainder of the moveable and immoveable property to the said boy. Since then I have taken the said boy in adoption in virtue of the consent and gift of his father and mother, after getting the vyavasthas (opinions) of pundits, and on performing the ceremony of jag according to the Shastras." Here is a clear indication of his intention, before making an adoption, to give the greater portion of his property to *Ardha Chunder*. He did not select him as being an adopted son, but for reasons independent of adoption, though they were likely to lead to it. The clause then continues, "Therefore, the said dear boy *Ardha Chunder* will be the heir to the whole of my moveable and immoveable property." It states the legal effect of the adoption—viz., that *Ardha Chunder* would take the whole of his property, subject only to such duties of the maintenance of other persons as the law imposed. But this would not have been consistent with the testator's intention, and he proceeds to say: "But I direct that, excepting the property granted by me as stated in

paragraph 11 of this will, the said *Sriman Ardha Chunder Roy Chowdhry*, and after him his son, and after him his grandson, and on the death of the latter, his great grandson shall obtain the proper share, ancestral, of my father, the late *Pran Krishna*, and the 4-annas share out of the proper share of my uncle, the late *Sri Krishna Roy Chowdhry*, obtained by me by gift under his will, and the self-acquired moveable and immoveable property of me and my father which will be left. If, through my misfortune, *the said boy* die without leaving a son, which God forbid, then I give permission to my wife *Kadumbini* that she may, for the purpose of providing for the presentation of funeral cakes and libations, take in adoption two sons in succession, one on the death of the other, from one of my paternal cousins who may have sons." And there is a direction that if no son be had of his paternal cousins all his daughters' sons shall be in equal shares entitled to his paternal and self-acquired property.

It will be observed that he says, "the said boy die without leaving a son," not "said adopted son," or "my adopted son." The bequest is to *Ardha Chunder* by name, and is not dependent upon the adoption. Both the Lower Courts have so decided, and their Lordships are of opinion that their decision should be affirmed.

As to the second appeal, in which *Shib Chunder* is the Appellant, it was admitted by his learned counsel that, so far as it relates to the share of *Sri Krishna Roy Chowdhry*, it could not be supported, and should be dismissed. The other questions in it are raised in the first appeal and decided by the above judgment. Their Lordships will therefore humbly advise Her Majesty to dismiss both appeals, and to affirm the decree of the High Court made in the appeals to it. The Appellants will pay the costs of these appeals.

Solicitors for Appellants: *Barrow & Rogers.*

Solicitors for Respondent *Ardha Chunder Roy Chowdhry: T. L. Wilson & Co.*

Solicitor for *Shib Chunder Roy Chowdhry: S. G. Stevens.*

Solicitors for Respondents *Gobind Mohini* and *Bama Soondari: Barrow & Rogers.*

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March 6, 7, 11, 12.
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Feb. 6.

SURENDRAKESHAV ROY . . . . . PLAINTIFF;

AND

DOORGASUNDARI DASSEE AND ANOTHER DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Simultaneous Adoption—Will—Construction—Gift to a Thakoor—Shebaits—Ikrar between Testator's Widows—Rights under an Ikrar of Persons not Parties thereto.

It is settled law that a Hindu simultaneous adoption is invalid.

Where a Hindu bequeathed all his property to a Thakoor, to secure the proper performance of the sheba and other ceremonies, directing his two widows, each to adopt a son, both of which sons he appointed shebaits, subject to the control of the widows during minority, with monthly allowances from the surplus income, the residue being undisposed of; and the widows purported to adopt under such direction, at the same time binding themselves each to the other under an ikrar which recognised the rights of the boys to nurture and the enjoyment of the estate, partitioned the said estate both as between the widows and the boys until the younger attained majority, and provided that the surplus income of each moiety should be accumulated and handed over by each widow to her own son on coming of age:—

Held, in a suit by the son of the elder widow, after his mother's death, against the younger widow and her son, that under the will the widows, as heirs, became shebaits, and entitled for the widows' estate to such interests in the testator's property as were undisposed of by the will.

Second, that the boys could not take under the will either as adopted sons or as shebaits.

Third, that, although the boys were neither adopted sons of the Rajah nor formal parties to the ikrar, yet they were parties to the transactions of which the ikrar formed part, and that the Plaintiff could enforce the provisions thereof against the surviving widow so far as she had bound herself to deal with the estate in his favour.

Fourth, that each son was entitled on attaining majority to a moiety of the surplus income of the estate during the life of the surviving widow, and to the accumulations thereof, accounts against the widows being directed accordingly.

The widow having died before judgment, the testator's heir was added as a party, application to be made to the Court below to add all other necessary parties.

APPEAL from a decree of the High Court (April 27, 1887), reversing a decree of *Norris*, J. (August 15, 1885).

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

The suit related to the property of *Rajah Bejoy Keshav Roy*, deceased, of *Asedol*, in the *Hoogli* district. He died on the 20th of April, 1879, without issue, leaving two widows, *Nobodoorga Dassee* and *Doorga Sundari Dassee*. The former died on the 28th of July, 1884.

The facts are stated in the judgment of their Lordships.

The prayer of the plaint, which contained an allegation that the two adoptions took place on the same day, but that the Plaintiff's was prior in point of time, was to have the will construed and the rights of all parties declared, with consequential relief.

Norris, J., decided (1.) that the authority contained in the will was an authority to adopt simultaneously and not distributively; (2.) that the adoptions were in fact simultaneous and not successive, and that the Plaintiff's evidence as to their being successive was unworthy of belief; (3.) that in accordance with *Akhoy Chunder Bagchi* v. *Kalapahar Haji* (1), simultaneous adoptions are invalid; (4.) that the Plaintiff took as *persona designata* a moiety of the testator's estate, referring to *Monemothonath Day* v. *Onauthnauth Day* (2). His decree declared that, according to the true construction of the will, the Plaintiff and the second Defendant upon their adoption became shebaits of the idol, and contained certain orders consequent on that declaration.

The Appellate Court concurred with *Norris*, J., in thinking simultaneous adoptions to be bad, but held that the Plaintiff could not take as a *persona designata*, as the testator did not know who would be adopted, and gave his estate to sons to be adopted, and the Plaintiff did not answer that description, as he was not validly adopted. It, however, remanded the suit, under sect. 566 of the Civil Code Procedure, to try this issue: whether the Defendant had so acted as to be estopped from denying the Plaintiff's title, or to have made herself a trustee for him to the extent of the interest which he claims.

Norris, J., on the 8th of September, 1886, found on the fresh evidence taken by him, that the widows agreed to execute the ikrarnamah to preserve the rights of their adopted sons.

The High Court reversed the decree of *Norris*, J., and dismissed

(1) Law Rep. 12 Ind. Ap. 198. (2) 2 Ind. Jur. (N.S.) 22.

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the suit. The Judges agreed with *Norris*, J., that at the time of the adoption, and also at the date of the ikrarnamah, the widows were well aware that the adoptions were doubtful; but they held that the junior widow was not precluded, either by her consent to a double adoption or by the terms of the ikrarnamah, from contesting, on the death of the senior widow, the validity of the Plaintiff's adoption, and that no trust in the Plaintiff's favour was created by the acts and admissions of the junior widow.

The material portion of the High Court's judgment (which was delivered by *Wilson*, J.) related to the finding of *Norris*, J., on the issue remanded to him and found by him in favour of the Plaintiff, and is as follows:—

"Two questions, obviously, arise upon that; first, whether that finding can be supported, and secondly, if it can, whether it entitles the Plaintiff to any, and, if so, to what relief.

"The answer to the first question must depend mainly, no doubt, upon the construction of the ikrarnamah; but it has been contended for the Plaintiff that certain conclusions of fact have been established materially affecting the construction of that document; and, therefore, before construing the document, it seems to be necessary to ascertain how far that contention has been made out.

"It was contended, in the first place, that before either of the boys was given in adoption, an agreement was arrived at between the parties concerned, one term of which was that an ikrarnamah was to be executed after the adoption, securing to the boys, in some sense, the interest which they would have had if they had been validly adopted sons; that this arrangement was made in consequence of the knowledge which all the parties then had of the doubtfulness of the simultaneous adoptions, and that the boys were given in adoption on the faith of that undertaking.

If that had been established, it might have been fairly contended (whether the contention would or would not have prevailed we need not now consider) that by that arrangement prior to the adoption, each of the ladies had constituted herself, in some sense, a trustee for her own boy, so that a fiduciary relation was established, apart from and prior to the ikrarnamah; and that when the ikrarnamah was entered into, dealing with

the management of this property, it was a document executed by the two ladies, not merely on their own behalf, but as trustees for, and for the benefit of the boys whom they represented. And that might perhaps have had a material bearing upon the construction and operation of the document.

"With regard to that, it is enough to say that the contention wholly fails on the evidence. . . . .

"Then a second allegation of fact was contended for, which, I think, may be put thus—that even assuming that there was no agreement prior to the adoption, and that nothing resembling a trust has been created, except such as the ikrarnamah itself created, still that the circumstance which led to the execution of the ikrarnamah was the knowledge which the ladies, and those about them, had of the doubt as to the validity of the double adoption, and that the precise mischief, to remedy which the ikrarnamah was made, was the unfortunate position in which the two boys might be placed by reason of the uncertainty of their legitimacy. And it was argued, and I am disposed to think rightly, that in construing such a document, just as in construing a statute, we must bear in mind the mischief which it was intended to remedy.

"In order to see how this really stands, it is necessary to look at the nature of the transaction with which we are dealing. I am not going at present to examine the document in detail, but only to look at the nature of the transaction of which this ikrarnamah forms part. It would be a great mistake to regard the ikrarnamah as a thing standing by itself; it is part of a transaction which it took five documents all executed at one and the same time to give effect to. There was the ikrarnamah, there was an izara pottah by which one-half of the whole property was given in izara to *Bhobodaini*, the father of the younger Ranee, a similar pottah by which the other half of the property was given in izara to *Kaliprosono Ghose*, the brother of the elder Ranee, an ammooktearnamah executed by the younger Ranee in favour of her father in broadest and most sweeping terms, and a like ammooktearnamah executed by the elder Ranee in favour of her brother. The principal effect of these documents taken together was, that one-half of the property was made over to the father of

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the one Ranee, and the remaining half to the brother of the other, and that half the income was made over separately to one Ranee and the other half separately to the other. These were not only the principal effects of these documents, but they were the only immediate and present effects; any operation with reference to the boys was wholly future and problematical. This is the nature of the transaction we are dealing with."

The judgment then considers the evidence as to what led to the transaction, with this conclusion: "To my mind it seems clear that the ikrarnamah was not made in consequence of the supposed or dreaded invalidity in the adoption, but for a wholly different purpose, in order to settle the quarrels between the two ladies, to provide for the management of the estate, and to enable these two gentlemen to get the izarahs."

It then proceeded:—

"The third contention of fact insisted upon was this, that at any rate the ladies, when they executed this ikrarnamah, knew that this double adoption was either invalid, or at any rate doubtful. . . . . I think these ladies knew that there was a doubt as to the validity of such adoptions, though I do not think that was the reason why they executed the ikrarnamah. I do not see myself how the bare fact of such knowledge can materially affect the construction of this ikrarnamah entered into for another purpose. If the ikrarnamah were clearly and specifically a document giving rights to the Plaintiff, and if the Defendant were seeking to get rid of the effect of the document, by shewing that it contained incorrect recitals about the adoption, it might well be that her knowledge of the doubts that existed, and therefore of the possible incorrectness of those recitals, would preclude her from relying on the inaccuracy; but that is not the case here.

"The result is that these contentions of fact which were raised by the Plaintiff have failed, except the last, that the ladies knew about the doubt as to the effect of the adoption. It is therefore necessary to examine what the ikrarnamah read by itself says.

"It recites the death of the Rajah and his will; it recites that in accordance with the provisions of the will 'we have together, at the same time, and with reciprocal consent, each taken a son in adoption in accordance with the shastras and general usage.'

Again, it goes on to say: 'The said two *Coomars* have become the heirs and representatives of our deceased husband, in the same way as if they had been sons born of his loins. During the present minority of the two sons, we as their mothers and guardians will continue to rear and take care of them. With regard to the rights of the said two sons, neither we nor any of our heirs will ever be competent to raise any objection.' This is all in form recital, and then the document goes on: 'We according to the purport of the said will having both jointly agreed and taken over to our satisfaction the zamindaries, putnees, lakhiraj, and all the other immoveable properties dedicated by our husband to the goddess *Sree Sree Isshur Annopoorna Thakooranee*, and considering it exceedingly necessary to make rules for the preservation, supervision, settlements and all other transactions in respect of the said property so that everything may be carried out,' and so on; then it says 'we are writing this ikrarnamah' in which it is provided that they shall jointly carry on the duties of shebaits, pay the Government revenue, and rates and taxes, and defray all expenses for the preservation of the property out of the income of the estate; then it goes on: 'After the debts of the estate have been liquidated, then after meeting the fixed expenditure, we will both of us divide and take in equal shares the money which shall be left in the joint *tahavil* (till). And out of that money, meeting our respective necessary expenses, and the expenses of the maintenance and education of our respective adopted sons, whatever surplus remains we will keep the same in our respective custody; and when our respective adopted sons attain majority, we will make the same over to him to his satisfaction. Besides this we will not be liable to any one else for an account of the said money.' Then they go on to refer to certain arrangements with regard to the shebaitship expenses and the turns of worship, and to say that they have given ammooktearnamahs to their respective male relatives.

"The first thing obvious about that document is this, that it is a contract between the two ladies to which no one else is a party. It is obvious that every one of the provisions, in what purports to be the operative part of the document, is an agreement as to

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management, or the division of the proceeds of the property between the two ladies, or the distribution of liability between them.

"The next thing obvious about it is, that it is an agreement purporting to deal with the property, so long as the ladies are jointly interested in it; every specific provision in it of necessity comes to an end the moment they cease to be two joint owners; that is to say, the moment either of the ladies dies; and that is strictly in accordance with the evidence, which I have already examined as to the causes that led to the execution of the document.

"There are two particular passages in this document which were relied upon as creating an estoppel or trust in favour of the Plaintiff. The first is the passage in the recital where it is said that the ladies will 'continue as their mothers and guardians to rear and take care of them. With regard to the rights of the said two sons, neither we nor any of our heirs will ever be competent to raise any objection.'

"The question that arises is, Can this recital give rise to any estoppel in favour of the Plaintiff? I think it cannot, and for this reason:—I think that a recital in a deed can only operate as an estoppel between the parties to the deed, or those who in some way claim under them, and that even between them it can operate only to the extent, and for the purpose, of the transaction which is embodied in the deed. If it had been shewn that these ladies had contracted as trustees for their respective sons, it might well be that any estoppel arising on the deed might enure to the benefit of the sons. But that is not so here. The estoppel, if any, is between the two ladies who are the only contracting parties. And the arrangement made by the deed being for the management of the property so long as the ladies remained joint, if it did give rise to any estoppel, that could only have effect during their joint lives and with regard to the management of the joint property. I do not see how there could be an estoppel in favour of any other person, or in respect of a matter foreign to the objects of the deed.

"The second passage is that where, after saying that they shall divide the money that may be left after paying the debts and

fixed expenses, they go on to say: 'That out of that money, meeting our respective necessary expenses and the expenses of the maintenance and education of our respective adopted sons, whatever surplus money remains, we will keep the same in our respective custody, and when our respective adopted sons attain majority, we will make the same over to him to his satisfaction. Besides this, we will not be liable to any one for an account of the said money.'

"Suppose this paragraph had not been there, on the state of things which was recited, and which, I suppose all the parties expected would be allowed to prevail, namely, that the adopted sons should take the estate as adopted sons, what would have been the position of the ladies with regard to their liability to account? It would have been this, that both the ladies would have been liable to account to both the boys, and therefore each lady would have been liable to have her affairs overhauled, not only by her own child, but also by the child of her co-widow. And what would be the effect of this clause if operative? The effect would be, to relieve each of the ladies from that annoyance, and to limit her liability to account by making her accountable only as to her own half of the property and to her own child. I do not think it can be said that a clause of this kind, which purports to limit liability, and which expressly negatives any obligation in each widow to account to the child of the other, has the effect of creating a trust in each lady for the child of the other.

"I think, therefore, that the argument based on the ikrarnamah fails; and that so far as that document is concerned, there is no estoppel and no trust.

"But Mr. Evans lastly put his case on another ground. He contended that, wholly apart from the ikrarnamah, the adoption itself, and the fact that down to the death of the elder lady, the boy whom he represents was treated by her and the first Defendant as an adopted son, creates an estoppel as against the first Defendant.

"I do not think that that proposition can be maintained. This is not a case of a representation of fact made by one person to another where one knows the truth and the other does not. The

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Plaintiff's case is that, at the time of this adoption, everybody knew that it was, or might be, an invalid adoption. It follows that there can be no estoppel by reason of one person having been misled by another. Again, it is not proved or suggested that the Plaintiff has lost anything by what has taken place. There is nothing to shew that his position in his own family has been in any degree affected. It has not been shewn that he is any the worse off by his adoption. I am unable to see any ground for the estoppel contended for. The Plaintiff seeks, I think, to carry the doctrine of estoppel further than has ever been suggested before; because first he argues that a lady, who adopts under the will of her husband, and simply in pursuance of her husband's instructions, is thereby precluded from denying, at any time afterwards, the validity in law of the adoption which she has made; and, secondly, it is contended that her co-widow is equally estopped from denying that adoption, if by arrangement the two adoptions have been made at the same time. I think we should be going much beyond the decided cases if we were to hold that even as against the adopting mother herself there is an estoppel, but that question is not before us. I said just now, it would be going against what has been decided. In the present case, I cannot see that any of the grounds upon which estoppels have been allowed to prevail exist. The result is that, in my opinion, the whole of the Plaintiff's case fails, and the finding of the learned Judge that there is an estoppel or a trust cannot be sustained. It is unnecessary, therefore, to discuss what relief, if any, the Plaintiff would be entitled to, if that finding had been upheld. It is clear, I apprehend, that no estoppel or declaration of trust created by the first Defendant could have interfered with the religious trusts of the will. Anything done must have been subject to them. On the other hand, there is much in the will itself tending to shew, that though the religious trusts may be valid, they are not exhaustive, and do not require the application of the whole of the funds. There is much reason to think that there must be a surplus of these funds. The relief which I suppose the Plaintiff might have been entitled to, if he had succeeded on the facts, would have been an inquiry as to what the religious trusts were, and when

those trusts and the money required to carry them out had been ascertained, a declaration that he was entitled to a half share of the surplus. But it is not necessary to deal with that in the present case. The result is that in my judgment the suit must be dismissed."

Rigby, Q.C., and *C. W. Arathoon*, for the Appellant, contended that the High Court was wrong in dismissing the suit. On the true construction of the will the Appellant was sufficiently described to enable him to take as a *persona designata*, there being nothing to render his bequest conditional on the validity of his adoption, which the testator must have known to be doubtful. If that is not so, still he was entitled to relief in this suit as against the widow, on the ground of the fiduciary relationship assumed by her towards him at the time of the adoption, and of the subsequent transactions, of which the ikrarnamah formed part. The widows knew that the adoptions were of doubtful validity, but they also knew that they had incurred obligations towards the adopted boys, and the object of the arrangement was to provide by consent a mode of discharging them. The principle of the arrangement was that they created a trust in favour of the boys, whether adopted sons or not, and constituted themselves trustees. The respondent is estopped from denying the Appellant's claim by her representations, and especially by her conduct. The ikrarnamah was not the only transaction. It was one of a series of transactions, and the intention and effect of them all taken together was to confer certain rights upon the boys which the Courts will enforce. Though the Appellant and the other adopted boy were not formal parties to the ikrarnamah, yet the widows made the agreement in their interests and on their behalf, acting as their guardians, if not as their adoptive mothers. They had rights springing out of this ikrarnamah and the other transactions of which it formed part, which it was equitable should be enforced against the parties thereto, to the extent, at all events, of their interests under the will. The terms of the ikrarnamah shew that the widows bound themselves to deal with the estate, so far as their powers extended, in favour of the boys, and in a certain specified way.

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Their interest in the estate was that they were appointed shebaits under the will, and in that way had control over the estate dedicated to the Thakoor. They were also heiresses-at-law entitled for the estate of Hindu widows to all the husband's property undisposed of by the will. The surviving widow was sole shebait and sole heiress. So long as she lived the ikrarnamah could be enforced against her to the extent of her shebaitship and widów's estate. Reference was made to *Page* v. *Cox* (1); *Sukhbasi Lal* v. *Guman Singh* (2); *Gopalayyan* v. *Rayhupatiayyan* (3); *Sadashiw Moreshwar* v. *Hari Moreshwar Ghate* (4); *Eshan Kishor Acharjee Chowdhry* v. *Haris Chandra Chowdhry* (5); Sir *Thomas Strange's* Hindu Law (6); *Sreemutty Rajcoomaree Dossee* v. *Nobocoomar Mullick* (7); *Sidessuree Dassee* v. *Doorgachurn Sett* (8).

Cowie, Q.C., Sir *H. Davey*, Q.C., and *Doyne*, for the Respondent *Doorgasundari Dassee*, contended that the suit was rightly dismissed. The Appellant, not having been validly adopted, is a stranger to the estate of *Rajah Bejoy Keshav*, which is represented by this Respondent as his heiress-at-law, and has no *locus standi* to maintain this suit. According to the intention of the Rajah's will, the widows became joint shebaits. They did not under the will succeed to the estate. The mention of them in the will at all was only ancillary to the adoption. That has an important bearing on the meaning of the ikrarnamah. The boys were neither adopted sons nor *personæ designatæ* under the will, but as strangers to the estate were introduced to the shebaitship by the widows. Under this will there was no beneficial interest beyond that to any one. The absolute bequest was to the Thakoor. The shebait had no beneficial interest. He is a trustee or worshipper; his only function is to administer. Reference was made to *Maharanee Shibessuree Debia* v. *Mothooranath Acharjee* (9); *Prosunno Kumari Debya* v. *Golabchand Baboo* (10); *Gossamee Sree Grudhareejee* v. *Rumenlalljee*

(1) 10 Hare, 163.
(2) Ind. L. R. 2 Allah. 366.
(3) 7 Madras H. C. R. 250, 265.
(4) 11 Bomb. H. C. R. 190, 192.
(5) 13 Beng. L. R. appendix, 42.
(6) Vol. i. p. 82.
(7) 2 Sevestre, 641.
(8) 2 Ind. Jurist, 24.
(9) 13 Moo. Ind. Ap. 272.
(10) Law Rep. 2 Ind. Ap. 145, 150.

Gossamee (1); *Rungama* v. *Atchama* (2); *Rajah Vellanki Venkata Krishne Row* v. *Venkata Rama Lakshmi Narsayya* (3); *Fanindra Deb Raikat* v. *Rajeswar Das* (4); *The Ramnad Case* (5). According to *Gossamee Sree Grudhareejee* v. *Rumenlalljee Gossamee* (1), if the appointment and succession to the shebaitship are not clearly marked out, the heirs take it. The widows in that case would be joint shebaits, and would be heirs taking the interest of the shebaits; the Respondent in that case being now sole shebait, and *quâ* shebait the sole heir.

When it is said that, under the ikrarnamah or otherwise, she has constituted herself trustee in favour of the boys, the proof of that statement must be examined. These boys were to perform religious ceremonies, and their qualification to do so was that they must be, either by birth or by adoption, members of the family. There is no evidence of representation or conduct, on the faith of which the infants acted. See *Indian Evidence Act*, sect. 91. It is of the essence of estoppel, whether by representation or conduct, that the party in whose favour it arises was induced to believe, and act on that belief. Here one side knew as much as the other, and the representation, if any, was of law which both sides knew to be doubtful. The substance of the case is, was the ikrarnamah a contract which enures to the benefit of the Plaintiff, who was not a party to it, and who could not on any known principle of law enforce it? It seems to have been in the nature of an irregular agreement between the widows for quiet enjoyment. It was made on the assumption that the will was valid, and that the adoption was valid, and that the boys would succeed in due course. The theory of this suit is that, by virtue of that arrangement, a stranger can be thrust upon the testator as shebait, in disregard of the direction given by his will. That cannot be supported by any law, and the contract must be regarded as one to substitute these boys as shebaits contrary to the will—a contract which the widows were not authorized to make, and which they cannot enforce. The contract is based on the assumption that the boys are the heirs-at-

(1) Law Rep. 16 Ind. Ap. 137.
(2) 4 Moo. Ind. Ap. 1.
(3) Law Rep. 4 Ind. Ap. 1.
(4) Law Rep. 12 Ind. Ap. 72.
(5) 12 Moo. Ind. Ap. 397.

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law of the testator and the shebaits under his will, and falls when that basis is found not to hold good. The widows never intended to transfer any property to which they were themselves entitled. Reference was made to *Lloyd's* v. *Harper* (1).

Rigby, Q.C., replied, referring to *Lloyd's* v. *Harper* (1); *Ashutosh Dutt* v. *Doorgachurn Chatterjee* (2).

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The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

On the 19th of April, 1879, *Rajah Bejoy Keshav Roy*, being at the point of death, made his will in the following terms:—

"I am now ill. God forbid it, but if any mishap occur therefrom, and from fear thereof, I do while of sound mind dedicate and give to *Sree Sree Isshur Annapoorna Thakooranee*, the Thakoor established by my deceased father, all the ancestral and self-acquired moveable and immoveable properties, zemindaries, and putnee, &c., whether as my own name or banamee, to which I am entitled and of which I am in possession. I have no sons or daughters of my loins. I have two wives living, viz., *Sreemutty Ranee Nobo Doorga*, the elder, and *Sreemutty Ranee Doorgasundari*, the younger. Each of the two Ranees will adopt one son. God forbid it, but if the son adopted by either Ranee should die, or be unfit for duty by reason of illness of any kind, then in such a case she will be competent to take in adoption a second son, and so on to a third. The two adopted sons of both wives shall remain the shebaits of the whole of the moveable and immoveable property dedicated to *Annopoornah Thakooranee* aforesaid. They will carry out the supervision and the improvement of the said property. But they will do everything according to the advice of all the principal officers appointed by me. They will not be competent to make gift or sale of the different properties. Up to the time that the said two adopted sons do not attain their majority, my aforesaid two wives will exercise the care and control of all the said properties, and in carrying out these duties they shall take the advice of all the principal officers which have been appointed by me. They will not be competent to act

(1) 16 Ch. D. 290. (2) Law Rep. 6 Ind. Ap. 182.

otherwise. When the two adopted sons shall have attained their majority, and shall have acquired sufficient knowledge for the preservation of the property, my two wives shall make over to them as shebaits, to their satisfaction, all the property dedicated to the *Issur Deb sheba.* Out of the income of the property dedicated to the *Deb sheba,* &c., after performing the *sheba* of the above-mentioned *Annopoorna Thakooranee,* and the *Sree Sree Issurs* established by my ancestors and myself, and after meeting the prescribed monthly allowances, and after performing the daily and fixed rites and ceremonies, as they are now performed and met, out of the profits which shall remain, each adopted son shall receive at the rate of 1000 (one thousand) rupees monthly. Therefore, while of sound mind and understanding, I execute this instrument of will. Finis, date 7th Bysack, 1286."

The next day the Rajah died, and the two Ranees mentioned in his will became his heirs-at-law. The estate is a large one. There is no precise evidence of its amount, but it is stated that the yearly income is not less than a lac of rupees. The elder Ranee appears to have relied for advice mainly upon her brother, *Kaliprosono,* and a pleader named *Tarrucknauth*; the younger upon her father, *Bhobodaini Mitter,* and a pleader named *Upendra Bose.* There was a long delay in obtaining probate of the will, which, however, was granted to the Ranees on the 30th of December, 1880.

Very soon after the Rajah's death *Tarrucknauth* expressed an opinion that a simultaneous adoption of two boys, such as the Rajah contemplated, was not lawful, and, after some discussion within the walls of the *Rajbari,* a case was prepared by *Tarrucknauth* for an eminent barrister, Mr. *Phillips,* to advise both the Ranees as to their position. On the point of adoption, Mr. *Phillips's* opinion was to the effect that, though the law was not completely settled, a double adoption would not be valid, and that the will did not authorize any adoption other than a double one.

The ladies determined to make a double adoption. How far they were guided by legal advice, how far by a pious desire to fulfil the directions of their husband, we cannot tell. They and their advisers certainly knew of the legal doubts and difficulties

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attending a double adoption. But one thing was quite clear. If they were to procure sons for their husband at all, it must be by the simultaneous adoption of two, for the will authorized no other course. It was impossible even to try the question whether their husband's wishes could be fulfilled, unless two boys were found whose parents were willing to give them in adoption one for each Ranee.

The boys were found. On the 20th of May, 1879, one month after the Rajah's death, and the day of his shradh, the double adoption was made. The elder Ranee adopted the Plaintiff, who is the natural son of one *Mirttonjoy*, and was then a boy of less than nine years. The younger Ranee adopted a child about a year old, the natural son of her cousin *Hurrydass Ghose*. She and her adopted boy are the Defendants in the suit.

No long time elapsed before there occurred the familiar incident of quarrels between the two wives. Some argument has turned upon these quarrels; but we do not know what they were about, or what was their duration, or when there was peace, and when war. *Pearymohun*, who was *Kaliprosono's* man of business, and went often to the *Rajbari* with communications to the Ranees, tells us: "The ladies were on good terms with each other for some time. . . . They were not on good terms at the time of the adoption; they had fallen out three or four days before. I heard there was a quarrel. I did not hear what it was about. They had made up, and were on good terms for ten and fourteen days, and then there was a quarrel, and this way it went on. When there are two co-wives these quarrels occur." That is a probable statement of the case. But, whether in the intervals of peace or notwithstanding quarrels, they managed to do business together.

On the 5th of July, 1879, they executed a document of great importance, viz., an ikrar relating to their management and enjoyment of the estate. After referring to the Rajah's will, and stating that "he had made over to both of us as shebaits the responsibility of looking after the property," and, after mentioning the direction to adopt, they continue thus:—

"In accordance therewith on the 7th Joistee last we have together, at the same time and with reciprocal consent, each

taken a son in adoption in accordance with the *shasters* and general usage; that is to say, I, *Sreemutty Ranee Nobodoorga*, have taken as a son *Sree Keshav Lall Dutt*, third son of *Sree Mirttonjoy Dutt*, inhabitant of *Hautkhola* in the town of *Calcutta*, by changing his former name and naming him *Sreeman Coomar Surendrakeshav Roy*; and I, *Sreemutty Ranee Doorgasundari*, have taken as a son the third son of *Sreejoot Baboo Hurrydass Ghose*, inhabitant of *Senhat* in the district of *Hooghly*, and have had him named *Sreeman Coomar Annoda Persaud Roy* alias *Coomar Norendrokeshav Roy*. The said two *Coomars* have become the heirs and representatives of our deceased husband, in the same way as if they had been sons born of his loins. During the present minority of the two sons, we as their mothers and guardians will continue to rear and take care of them. With regard to the rights of the said two sons, neither we nor any of our heirs will ever be competent to raise any objection."

They then state that it is necessary to make rules for the preservation and supervision of the property, and covenant that they will in equal shares as shebaits of the *Thakooranee* continue in possession of and preserve the debuttur property; paying in equal shares the various charges upon it; and that if either does not pay her share she shall be liable to indemnify the other. Then they go on:—

"After the debts of the estate have been liquidated, then after meeting the fixed expenditure, we will both of us divide and take in equal shares the money which shall be left in the joint *tovil* (till). And out of that money, meeting our respective necessary expenses and the expenses of the maintenance and education of our respective adopted sons, whatever surplus money remains, we will keep the same in our respective custody; and when our respective adopted son attains his majority, we will make the same over to him to his satisfaction. Besides this we will not be liable to any one else for an account of the said money. In order that the collections and supervision of the zemindaries and putnee talooks and mokrurep and lakhraj mehals, and all the other immoveable property left by our husband, may be performed without any hindrance, keeping a few of the properties in *khas tehseel*, we have given Izarah of

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all the rest of the property. The expenditure which has been fixed for the performance of the *Debsheva* and the daily and fixed ceremonies, &c., as well as all that will have to be performed in accordance with the will of our husband, the money for the said expenses, we will both of us provide in equal shares. And so that there may be no dispute in respect of the performance of the said *Debsheva*, and the daily and fixed ceremonies, &c., each of us will for one year at a time in rotation take upon herself the whole responsibility of the *Debsheva*, and the daily and fixed ceremonies, &c. And I, *Sreemutty Ranee Nobodoorga*, being the elder, have taken the first turn."

The Izara mentioned in this ikrar was effected by two contemporaneous deeds. By one of them thirteen mehals were demised for five years to *Kaliprosono*, and by the other ten mehals were demised for a like term to *Bhobodaini*. The rents are reserved to the two *Ranees* in equal shares. The Appellate Court below has thought that this transaction throws light on the object of the ikrar; but their Lordships can hardly appreciate its bearing on the case.

The two boys were taken into the *Rajbari*, and were there treated as adopted sons till after the death of the elder Ranee. That event happened on the 28th of July, 1884. Almost immediately afterwards disputes arose between the younger Ranee and the Plaintiff or his friends, and this suit was commenced on the 20th of August in that year.

The suit is in effect one for the administration of the Rajah's will, but with an addition which was made by amendment for the purpose of raising a claim under the ikrar. At the hearing in the original Court it was contended on the Plaintiff's behalf, first, that his adoption was prior in point of time to that of the younger boy and valid on that ground; secondly, that a simultaneous adoption was valid in law; and, thirdly, that the will carried the shebaitship to any one who was adopted according to its terms, whether his adoption was or was not good in law. The Judge of the Original Court, Mr. Justice *Norris*, decided against the Plaintiff on the first two points, and in his favour on the third.

Both parties appealed, and the Court of Appeal agreed with

the Original Court on the first two points, about which there is now no longer any question. On the third point they differed from the Original Court. But they considered that there were still questions arising on the acts of the Defendant, the younger Ranee, and on the 19th of March, 1886, they made an order of remand in the following terms:—

"It is ordered that this suit be remanded to the Court below to try the following issue, that is to say—whether the said Defendant had so acted as to be estopped from denying the Plaintiff's title, or to have made herself a trustee for him to the extent of the interest which he claims. And that the said Court do take any additional evidence that may be adduced by either party for that purpose, and do return its finding upon such issue to this Court, together with the evidence taken."

Upon this remand the case was again tried before Mr. Justice *Norris*, and a great quantity of evidence was taken, of which some is relevant, to shew the knowledge possessed by the Ranees of their position in May and July, 1879, and also to shew the connection between the adoption and the ikrar. The Original Court concluded "that the Ranees agreed to execute the ikrar to preserve the rights of their adopted sons," and formally found the issue in favour of the Plaintiff.

The Defendant, the younger Ranee, then appealed, when the Appellate Court reversed the finding of the Original Court, and dismissed the suit. Their views are expressed in a full and elaborate judgment; but, so far as they have been relied on by the younger Ranee at this Bar, may be briefly summarized. It it is not denied that both the Ranees knew of the invalidity, or doubtful validity, of the adoption they made. But it is said that the ikrar was not thought of before the adoption; that it was not made in consequence of the legal difficulty about the adoption, but to settle quarrels, to provide for the management of the estate, and to enable the brother of one Ranee and the father of the other to get the leases which they did get. It was therefore a separate contract between the Ranees, to which the boys were strangers, and which they could not enforce.

The Plaintiff now appeals from the decree dismissing his suit, and the whole case is thus opened. It seems to their Lordships

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that the issue which was tried on remand is not conceived in very apt terms, because there may be no estoppel binding the younger Ranee, and no trust except in a somewhat strained use of the term, and yet she may have entered into a bargain which she is bound to make good to the extent of her interest in the estate. But their Lordships, having the whole case before them, are at liberty to draw such conclusions as the allegations and proofs warrant. If the Plaintiff has a good claim under the ikrar, he is entitled to enforce it in this suit. The points substantially urged on his behalf at the bar are, first, that he takes as sufficiently described by the will; and, secondly, that he can sustain a claim against the younger Ranee personally by virtue of the ikrar. It is not now contended that his adoption is valid in law, as indeed it clearly is settled that it is not.

Their Lordships concur with the Appellate Court in the opinion that the Plaintiff can take nothing under the will. They do not find it necessary to give any opinion on the question whether a gift to persons whose description does not import that they should be born in the donor's lifetime can be valid, because they think the case rests on a clearer ground. There is no gift to the adopted sons except in the character of shebaits. And it would require very strong and clear expressions indeed to shew that a Hindu gentleman contemplated introducing as shebaits of his family Thakoor, two persons unknown to himself and strangers to his family. There is not a trace in this will to shew any such intention, or to shew that the testator doubted the legality of his scheme, or thought of any adoption but a legal one.

The Original Court decided in favour of the Plaintiff on this point, in reliance on the authority of *Dey* v. *Dey* (1). But in that case the testator had himself made a double adoption, and the boys lived with him and were called and treated as his adopted sons. As regarded them, there was strong ground for saying, as the Judges all agreed in saying, that a gift to his "adopted sons" was meant to go to the two boys whom he actually knew as such. Then the question arose as to another boy, who was substituted on the death of one of the original

(1) 2 Ind. J. (N.S.) 24.

two, in pursuance of a power given by the testator to his widow. Was he too sufficiently described? The Court, though not unanimously, held that he was, on the ground that he answered the same description which was applicable to the boy for whom he was substituted, and fell within the same intention of the testator to give his property in moieties to the two who had gone through the form of adoption. Their Lordships need not say whether they would decide that case the same way if it were before them. It is sufficient that it differs from the present case in an essential circumstance which governed the decision.

Adopted sons, then, being out of the question, what becomes of the property? The younger Ranee says that nothing can be more simple. All is given to the Thakoor, the heirs become shebaits, and manage the property in the usual way. But the matter is not quite so simple. It is true that by the first sentence of the will all is given to the Thakoor; and though in the plaint the question is mooted whether the gift is made *bonâ fide* (and of course such gifts may be a mere scheme for making the family property inalienable), it has not been really disputed. Nor indeed could it well be disputed in this case. For the last part of the will shews clearly enough that the income was to be applied first in performing the sheba of the Thakoor who is mentioned as the object of the gift, and of other family Thakoors, and in meeting the prescribed monthly allowances, and in performing the daily and fixed rites and ceremonies "as they are now performed and met." The testator must have been well aware that after all these charges had been met there would be a very large surplus. In fact he directs that out of the surplus each adopted son shall receive Rs.1000 monthly; but of the residue after that he says nothing.

There is no indication that the testator intended any extension of the worship of the family Thakoors. He does not, as is sometimes done, admit others to the benefit of the worship. He does not direct any additional ceremonies. He shews no intention save that which may be reasonably attributed to a devout Hindu gentleman, viz., to secure that his family worship shall be conducted in the accustomed way, by giving his property to one of the Thakoors whom he venerates most. But

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the effect of that, when the estate is large, is to leave some beneficial interest undisposed of, and that interest must be subject to the legal incidents of property.

In this case the Ranees were the testator's heirs. As heirs they would take the shebaitship. In some cases doubts have been expressed whether women ought to be shebaits; but whatever may be the force of those doubts, they can hardly apply to this case, seeing that the Rajah appoints nobody but his wives to perform the duties which his sons cannot perform by reason of nonage. Neither in this case can any question arise between the shebait and the heir, for they are the same persons. It appears to their Lordships that after performing their prescribed duties as shebaits, the Ranees became entitled to the beneficial interest in the surplus for the widow's estate. If that is so, each of them could contract so as to bind her own interest. The question now is whether the younger Ranee has done so.

It was earnestly urged at the Bar that the younger Ranee is estopped from denying the Plaintiff's claim. Their Lordships cannot assent to that. They observe that the word "estop" is often used in Indian cases very loosely to denote obligations which do not rest on estoppel at all. Such uses of the word are not countenanced by the definition of estoppel in sect. 115 of the *Indian Evidence Act.* It would indeed be difficult to see how the younger Ranee, who represents the whole inheritance in an administration suit, could be prevented from pleading anything but the true state of the case. However that may be, it is not the fact that she has caused anybody to believe something to be true which she now alleges not to be true. She is entitled to raise any defence which the facts of the case will support.

The arguments to shew that she has undertaken a trust appear to their Lordships to be verbal rather than substantial. The younger Ranee has not, by her dealings with the elder or with the boys, possessed herself of any property which she would not have got otherwise. The adoption indeed would, if it were legal, deprive her of property. There is no trust independently of the contract she has made. If that binds her to give the Plaintiff certain benefits she must give them; if it does not, she

is not bound in any other way. The essential question in this case is one of contract.

To solve this question, let us first see what the position of the parties was. It is quite clear that, though aware of the risk of illegality, the Ranees were determined on a literal execution of their husband's wishes. For that purpose it was necessary, not only that they should act in combination together, but that they should procure two boys to take part in the operations. It is no slight matter for a boy to be passed from one family into another. Even in *England* such a thing cannot be done without a serious effect, for good or ill, on the boy's welfare. In *India* the ties of family life are far stricter, and if a boy has been transplanted from his own family into another by a *de facto* adoption, and then the adoption turns out to be invalid in law, and he is rejected out of his adopted family, his relations to his natural family must be seriously disturbed. Whether his previously existing legal *status* would be taken away is a point not calling for any opinion. Assuming that the Plaintiff could return after an absence of five years, and so resume his legal position, it is impossible that his personal position should be the same as if the tie to his family had never been broken.

Is, then, the ikrar a transaction standing entirely by itself—a mere arrangement for the convenience of the two Ranees—or is it the latest in a series of transactions, beginning with the resolve of the Ranees to make a double adoption? *Tarrucknauth*, who prepared the draft, died before the remand, and therefore has given no evidence as to the connection between the adoption and the ikrar. His bill of costs is in evidence, which shews only that the ikrar was for control and management of the estate, and for effecting an amicable settlement between the Ranees. *Kaliprosono* says that, when the question of adoption was discussed before the adoption, it was first suggested that the ikrar should be executed; that the suggestion emanated from *Tarrucknauth*, and Mr. *Phillips's* opinion had then been received. *Pearymohun* says that he explained the opinion to the Ranees, and communicated to them *Tarrucknauth's* advice to take two boys in adoption, and afterwards execute an ikrar, and that the rights of the adopted sons would be preserved. He adds that the elder Ranee

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assented to that personally, and that *Bhobodaini* assented for the younger. *Gobind Chunder*, one of the amla, says that he was present on that occasion; and he confirms *Pearymohun* in essentials. He differs, however, in saying that the younger Ranee expressed her assent, whereas *Pearymohun* says that she did not, but her father did. *Hurrydass Ghose*, the natural father of the younger boy, speaks to a conversation with the younger Ranee, in which she stated that: "We two Ranees have agreed between us that we will take two boys, one each, according to the terms of the will of our husband, and after taking two boys in adoption we will give them such a pucka writing that their interest will not be jeopardized, and even if such adoption should not be held valid, we will by the document we intend to give make over our respective rights to those boys." The same assurance, he says, was repeated by her in her father's presence on another occasion before the adoption. Answering questions in cross-examination he says, "When she said she would give a writing I consented. I said, 'I will give you the child, and you can do what you think proper.' I did not make it a condition, but when she said she would give a writing I was quite satisfied." This witness is commended and relied on by the original Judge.

On the other hand, the younger Ranee and *Bhobodaini* deny the whole story; but they were so entirely discredited before the original Court that their denials are of no value, nor does the Appellate Court rely on them. They rest principally on *Tarrucknauth's* bill of costs, and on statements of *Upendra Bose*, who, though advising one of the parties, states that "nothing was said as to securing the rights of the adopted sons," and contradicts some statements made by *Pearymohun* respecting Mr. *Phillips's* opinion. They also rely on the fact that *Mirtunjoy*, the father of the Plaintiff, and several members of the household, either knew nothing about the matter or have not been called as witnesses. It appears to their Lordships that the sole evidence of any weight against the connection between the adoption and the ikrar is that of *Upendra Bose*, who certainly might be expected to have known the facts. The quantity of evidence, and, as the Judge who heard it thought, the quality of it, is in favour of that connection; and the Appellate Court think it clear that the two

things were connected; but not in consequence of the invalidity of the adoption.

But after all, the main evidence is that of the ikrar itself. How can it be explained? The views of the two Courts have been before stated. Their Lordships quite concur with the Appellate Court thus far, that it may have been an object of the ikrar to settle quarrels between the Ranees, though it does not seem to have been efficacious for that purpose, nor particularly well adapted for it. They might still quarrel over every item of joint expenditure, and over the division of the surplus, as effectually as when their interests remained joint. But their Lordships cannot understand how the ikrar facilitated the grants made to the relatives of the Ranees, nor how those grants tended to settle quarrels, seeing that it was not provided that the elder Ranee should take the whole rent reserved on *Kaliprosono's* lease, and the younger the whole reserved on *Bhobodaini's*; but the rents reserved on each lease were made payable to the two Ranees in equal shares. Nor are they able to understand in what way the ikrar was connected with the adoption, as the Appellate Court thinks it clearly was, unless it were for the purpose of conferring an interest on the boys.

It is true that the document does not say outright that the adoption may be invalid, and that it is intended in that event to give the boys an interest in the widows' estate. Perhaps the framer of it did not choose to put on record the misgivings of the parties as to the legality of their action. Neither does it say that quarrels have arisen, and are to be settled in this way. The bolder course of stating the real motives and intentions would also have been the safer; but it is not followed. The deed does not on the face of it express either the motives supposed by the original Court or those supposed by the Appellate Court. But those supposed by the Appellate Court do not account for the introduction of the boys, who on their theory have no place or part in the arrangement at all.

Nothing can be more explicit or precise than the recognition of the rights of the boys to nurture and to the enjoyment of the estate, while it is remarkable that they are not mentioned at all in the character of shebaits. According to the ikrar, the Ranees

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are shebaits. The boys are "heirs and representatives" of the Rajah. During their minority "we, as their mothers and guardians, will continue to rear and take care of them." With regard to their rights, "neither we nor any of our heirs will ever be competent to raise any objection." Furthermore, the Ranees go on to effect a partition, not only between themselves, but between the boys until the younger attained majority. The surplus of each moiety is to be accumulated and handed over by each widow to her own son when he comes of age. If the boys were really heirs, such an arrangement as that would be futile; they would be joint heirs, and their property would be joint property. It could only take effect out of the widows' interest, and on the footing that the boys were not the owners. And all this is done by persons who are advised that there has been no legal adoption, and who are stated by credible witnesses to have agreed to give a writing for the protection of the boys. The Ranees wished to make the boys the heirs of the Rajah. In form they did so; they could not do it in substance. But they could, so far as their own interest would go, give them the same benefit out of the property as if they had actually been heirs. Their Lordships hold that the deed expresses this intention, and that by it the Ranees became bound to one another and to the boys to carry it into effect. It is a startling thing to be told that the Ranees could immediately afterwards turn the boys adrift, or that the survivor of them can do so after the arrangement has been in force for five years.

But it was strongly urged at the Bar that the boys cannot enforce a contract to which they are not parties. It is true that they are not parties to the ikrar considered as an isolated transaction; nor could they be, by reason of their tender age. But if, as above shewn, it is true that the ikrar is one of a series of transactions, that it is closely connected with the adoption, that the use of the boys was a necessary part of the attempt to accomplish the Rajah's wishes, and that their position in life was substantially altered by taking them away from their natural families for an indefinite time, it seems to their Lordships impossible to maintain that they are strangers in the matter, and that they cannot insist on the performance of the contract by

which each Ranee bound herself to the other to deal with the estate in their favour.

The decree of the Appellate Court dismissing the suit should be discharged. The decree of the original Court cannot be restored, partly because it proceeds on the ground that the boys take under the will, and partly because the accounts directed by it are not applicable under the circumstances. Their Lordships think that the decree should take the following form :—

Declare that, according to the true construction of the testator's will, the property thereby given to the Thakoor therein mentioned was given for the purpose of securing the proper performance of the sheba of the said Thakoor and the other family Thakoors in the will mentioned, and the prescribed monthly allowances, and the proper performance of the daily and fixed rites and ceremonies as they were performed and met in the testator's lifetime.

Declare that the other dispositions of the will are inoperative, and that on the testator's death his two widows were his heirs-at-law, and as such became shebaits of the Thakoor, and entitled for the widows' estate to such interests in the testator's property as remained undisposed of by the will.

Declare that, according to the true construction of the ikrar, and in the events which have happened, the Plaintiff on attaining his majority became entitled to the accumulations of one moiety of the surplus income of the testator's property after answering the various charges and outgoings in the ikrar in that behalf mentioned.

Declare that, upon attaining his majority, the Plaintiff became entitled to receive one moiety of such surplus income during the life of the Defendant *Doorgasundari.*

Declare that the Defendant *Annadaprashad Roy,* also called *Norendrokeshav Roy,* is entitled to the other moiety of such surplus income during the life of the Defendant *Doorgasundari,* and to the accumulations thereof.

Direct the Court below to order an account to be taken of the testator's property at his death, and of all the income thereof which has come to the hands of his widows, or of either of them,

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or of any person by their order or on their behalf or for their use during the life of the Defendant *Doorgasundari.*

Also an account of what has been properly expended upon the sheba, and the monthly allowances, and the daily and fixed rites and ceremonies mentioned in the will, and upon the several outgoings and charges mentioned in the ikrar as precedent to the division of the property between the two widows, and of the respective necessary expenses of the widows, and of the maintenance and education of their respective adopted sons.

Any other questions arising out of the relief granted must be reserved for further directions by the Court below.

As regards costs, their Lordships consider that these unhappy disputes have arisen mainly out of the testator's will, and the apparently quite honest attempt of his widows and heirs to fulfil his intentions. It is only just that the costs of the parties in both the Courts below, including the costs of this appeal, should be defrayed out of the *corpus* of his estate.

They will humbly advise Her Majesty accordingly.

After this case had been argued, their Lordships received an intimation that the Defendant *Doorgasundari* had died. This death made the suit defective in two respects; first, by the death of the then heir the inheritance ceased to be represented; secondly, there was no person in whose presence the accounts directed against the widows could properly be taken. The proceedings were suspended, in order that these defects might be cured; but though the Rajah's heir has been brought into the suit, there is still no representative of the widows. Their Lordships, however, think that it is not necessary on account of this defect to delay the decree any longer. It rests with the Plaintiff to apply to the Court below for all such parties as are necessary for this purpose to be brought upon the record.

Solicitors for the Appellant: *T. L. Wilson & Co.*

Solicitors for the Respondent *Doorgasundari: Barrow & Rogers.*

NAM NARAIN SINGH . . . . . PLAINTIFF;

AND

ROGHUNATH SAHAI (MINOR UNDER GUARDIANSHIP) . . . . . DEFENDANT.

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March 15; *April* 2.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Principal and Agent—Suit by Agent—Amendment of Plaint—Authority to sue.

Where landowner's agent sued to recover arrears of rent, and afterwards, on objection taken to his authority, obtained an order of Court amending the plaint by substituting the name of his principal :—

Held, that on failure to prove his authority to sue, the suit was rightly dismissed, and that the order amending the plaint was not a decision as to the authority in question.

APPEAL from a decree of the High Court (Feb. 1, 1888), affirming a decree of the Deputy Collector of *Hazaribagh* (June 30, 1886).

The facts are stated in the judgment of their Lordships.

The suit was for rent reserved by a lease, and was instituted in the above Court, under the provisions of Act I. of 1879, of the Bengal Council.

Graham, Q.C., and *Branson*, for the Appellant, contended that *Sheo Narain Lall Sett*, the agent, was entitled to bring this suit in its original form, under Act I. of 1879; but that after the amendment of the plaint, his title to maintain the suit in its amended form could not be disputed. For it thereupon became the suit of the Appellant, and was not open to any objection founded on the terms of the agent's sunnud, which merely prohibited the agent from recognising any person as heir of a deceased ilakadar without his principal's permission. With regard to the order of amendment no appeal was made from it, and it became final, and was in its effect conclusive as to the right of the agent to maintain this suit in the name of his principal. Reference

* *Present* :—LORD MACNAGHTEN, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

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was made to Act XIV. of 1882, sects. 36, 37, and 41. [SIR R. COUCH: The effect of your succeeding in this suit, without proving your authority to sue, would be to recognise the Defendant as the heir, which recognition was forbidden to the agent by the sunnud.] Reference was made to *Huro Prosad Roy* v. *Kali Prosad Roy* (1); *Madho Prakash Singh* v. *Murli Manohar* (2).

The Respondent did not appear.

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The judgment of their Lordships was delivered by

LORD HANNEN:—

This suit was originally brought in the Court of the Deputy Collector of *Hazaribagh* by *Sheo Narain Lall Sett* in his own name, but professing to act as the tehsildar and general agent of *Babu Nam Narain Singh* in respect of a property called *Raj Ramgurh*, to recover arrears of rent alleged to be due from the Defendant as occupier of a portion of that property.

Amongst other defences the Defendant alleged that the suit was not brought in the name of *Babu Nam Narain Singh* and on his behalf, and that the then Plaintiff, *Sheo Narain Sett*, had no authority in his sunnud to sue for arrears.

The Plaintiff, *Sheo Narain Sett*, for some reason applied to amend his plaint by substituting therein for his own name the name of his alleged principal, *Nam Narain Singh*, as Plaintiff, who would presumably be entitled to sue for arrears of rent not barred by limitation. This application to amend was resisted by the Defendant, but on the 16th of April, 1886, the Deputy Collector of *Hazaribagh*, before whom the case was pending, allowed the proposed amendment, thinking that the 27th section of the Civil Procedure Code, which authorizes such an amendment, was applicable to suits under the *Rent Act*.

There was no appeal from this order. What was done under it does not clearly appear, but in the final decree pronounced by the Deputy Collector the suit is described as one in which *Nam Narain Singh* is the Plaintiff. It must, therefore, be assumed

(1) Ind. L. R. 9 Calc. 295. (2) Ind. L. R. 5 Allah. 406.

that the substitution of the name of *Nam Narain Singh* for that of *Sheo Narain Sett* was properly effected.

When the case came on for hearing before the Deputy Collector, a preliminary objection was taken by the Defendant that *Sheo Narain Sett*, who had instituted the suit and obtained the amendment, had not shewn that he was the tehsildar or agent of *Nam Narain Singh*, and authorized to use his name as Plaintiff. The Deputy Collector considered this objection valid, and dismissed the suit. His decree has been affirmed by the judgment of the High Court, and from this judgment the present appeal is brought in the name of *Nam Narain Singh*. The Respondent has not appeared on this appeal.

The main argument on which the Appellant's case is based is that the order amending the plaint was conclusive between the parties as to the right to maintain the suit in the name of *Nam Narain Singh*.

Their Lordships cannot adopt this view. The position of the parties is not different after the order for the amendment of the plaint from what it would have been if the suit had been originally commenced by *Sheo Narain Sett* in the name of *Nam Narain Singh*. All that the Court did by allowing the amendment was to correct a supposed mistake made by *Sheo Narain Sett* in the institution of the suit. After that correction the suit would proceed as though it had been originally brought as corrected. The Deputy Collector did not, by allowing the amendment, decide that *Sheo Narain Sett* had authority to institute a suit in *Nam Narain Singh's* name. That, if questioned, would remain to be proved.

As reconstituted the suit purported to be brought by *Nam Narain Singh through Sheo Narain Sett*, his tehsildar and general agent. In all other respects the pleadings and issues raised remained unaltered, and the parties proceeded to offer proofs of their respective cases. Upon the hearing the Defendant took the preliminary objection already mentioned, that it was not proved that the suit was brought under any authority given by *Nam Narain Singh*.

It appears to their Lordships clear that a Court whose aid is invoked on behalf of one person through the agency of another

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is entitled in some form or other to inquire whether the alleged agent really had authority to bring the suit. It may be necessary to do so for the protection of the person sued. He would at least be exposed to the danger of being sued again by the principal if the agency did not exist.

In the present case *Sheo Narain Sett*, in his original plaint, alleged that he had authority in writing to bring suits in respect of arrears. If this was the fact, it was remarkable that he thought it necessary to amend the plaint; and further, though there was evidence that *Nam Narain Singh* knew that some legal proceedings were pending for recovery of rent, it was admitted by *Sheo Narain Sett* that he did not inform *Nam Narain Singh* that his name had been used as Plaintiff. But if, as there seemed reason to surmise, *Sheo Narain Sett* had not a general authority to sue for arrears of rent, but only some limited authority, if any, it was within the Defendant's rights to require the production of the alleged authority. But this production, though called for, and, as stated in the minutes of the Court, promised on the part of the Plaintiff, was never made. The alleged Plaintiff (*Nam Narain Singh*), though summoned as a witness on behalf of the Defendant, never attended to give evidence. *Sheo Narain Sett* was also subpœnaed by the Defendant, and he stated that he had been appointed *Nam Narain Singh's* tehsildar by deed; that he had been authorized to sue for arrears accruing before his appointment as tehsildar; that his authority to sue for arrears in this respect was recorded in his deed of appointment, and that that deed of appointment was filed in the Court of the Judicial Commissioner at *Ranchi*. No reason was, or has been now, assigned why this deed of appointment, or a copy of it, has not been produced, and, as the Deputy Collector pointed out, it was indispensably necessary that the authority should be submitted to the inspection of the Court, in order to see whether it was an authority to sue or only to collect rents, and to decide whether *Sheo Narain Sett* had *any* authority to bring the suit in the name of his alleged principal. It is clear from *Sheo Narain Sett's* evidence that he never informed *Nam Narain Singh* that an action had been brought in his name, and though *Sheo Narain Sett* stated that he had

special permission under *Nam Narain Singh's* seal and signature to bring the original suit, this document was not produced, and no legal evidence of its contents or excusing its non-production was given. Their Lordships therefore agree with the Judges of the High Court that the Lower Court was justified in dismissing the suit.

It was argued that the judgment appealed from is inconsistent, inasmuch as it condemns the Plaintiff, *Nam Narain Singh*, in costs, while holding that the suit was rightly dismissed on the ground of want of proof of *Sheo Narain Sett's* authority to bring it. This objection, if valid, applied to the judgment of the Lower Court, but it was not taken as one of the grounds of appeal from the Lower Court, and it does not appear that the attention of the High Court was called to this point. But the appeal being brought by *Nam Narain Singh*, he was properly condemned in costs for appealing against a judgment which, upon the materials before the Court, was rightly pronounced. His proper course would have been to prove that he had, in fact, given authority to *Sheo Narain Sett* to bring the suit in his name, but he made no application to be allowed to supply this proof, but simply appealed. By so doing he subjected himself to the jurisdiction of the Court to condemn him in costs.

Their Lordships will humbly advise Her Majesty to dismiss the present appeal.

Solicitors for the Appellant: *A. H. Arnould & Son.*

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5. 4, 10, 11, 4, 17, 18.
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March 19.

RAJCOOMAR ROY AND OTHERS (DEFENDANTS) . . . . . APPELLANTS;

AND

GOBIND CHUNDER ROY (PLAINTIFF) AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Law of Limitation—Presumption of Possession—Boundaries—Duty of an Appellant.

In boundary cases the Appellant must come prepared to shew clearly where the decree appealed from is wrong, and what other course is right; it is insufficient to raise doubts as to the correctness of the decision.

Where the Plaintiff suing in 1881 shewed title and possession in 1857 of the lands in suit, *held*, that possession must be presumed in the absence of evidence to the contrary to have continued to within twelve years of suit, and to shew the boundary line between the lands in suit and the Defendant's estate. It is unnecessary to prove acts of possession by the Plaintiff or actual dispossession by the Defendants within the statutable period.

APPEAL from a decree of the High Court (March 24, 1888), reversing a decree of the Subordinate Judge of *Jessore* (Sept. 18, 1884), which had dismissed the suit of the Respondent, *Gobind Chunder Roy*.

The facts and proceedings are stated in the judgment of their Lordships.

Cowie, Q.C., and *Branson*, for the Appellants, contended that the *onus* was upon the Plaintiff to prove that he had been dispossessed of the lands in suit within twelve years of action brought, and that he had not done so. On the other hand, the Appellants had shewn by their evidence, oral and documentary, that the lands had been in their possession for more than twelve years before the plaint was filed. The First Court had believed that evidence. It had not been established that the lands in suit formed portion of the lands dealt with in the mutnaza case referred to in the judgment of the High Court. On

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the contrary, the identity of those lands with the lands in suit had been disproved. On the whole evidence in the case it is proved that *Gobind Chunder Roy* never had possession of the lands in suit since 1857. Reference was made to arts. 142 and 144 of the *Limitation Act* (Act XV. of 1877), the latter of which applies where the plaintiff shews a title; and to Art. 147, under which possession must be shewn within twelve years. See also *Maharajah Koowur Singh* v. *Nund Loll Singh* (1); *Mahomed Ali Khan* v. *Khajah Abdool Gunny* (2); *Rajah Saheb Perhlad Sein* v. *Budhu Singh* (3); *Beerchunder Jobraj* v. *Deputy Collector of Bhullooah* (4). [LORD SHAND:—Where is it enacted by a law now in force that you must have had possession within twelve years?] In Civil Code Procedure 1877 and 1882 see definition of suit, and sect. 11, which says that cause of action must be shewn by plaintiff to have arisen within the period allowed by law. Here the cause of action arose when the Defendants obtained possession after the mutnaza case.

Doyne, and *C. W. Arathoon*, for the Respondent, *Gobind Chunder Roy*, were heard upon the question of limitation in connection with the identity of the lands claimed with the mutnaza lands. Reference was made to *Rao Karan Singh* v. *Rajah Bakar Ali Khan* (5); *Radha Gobind Roy* v. *Inglis* (6). The Defendants ought to have shewn at what time these lands were usurped. According to the evidence they were proved to have formed part of the Plaintiff's settled estate of *Babupore*, and to have been in the possession of his father within twelve years before the institution of the suit.

Cowie, Q.C., replied.

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The judgment of their Lordship was delivered by

LORD HOBHOUSE:—

This is one of the disputes which give rise to so much litigation, more apparently than is accounted for by the value of the

(1) 8 Moo. Ind. Ap. 199, 220.
(2) Ind. L. R. 9 Calc. 744, 750.
(3) 12 Moo. Ind. Ap. 275, 337.
(4) 13 Suth W. R. 23.
(5) Law Rep. 9 Ind. Ap. 99.
(6) 3 Suth. P. C., decisions p. 809; 7 Calc. L. R. 364.

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property, about the boundaries of contiguous estates when the land is uncultivated and the action of water is always tending to remove landmarks. The Respondent, *Gobind Chunder Roy*, is the zemindar of the mouzah *Babupore*, and is Plaintiff in the suit. The Appellants are talookdars or putnidars of the adjoining mouzah *Baraset*, and are Defendants in the suit. The controversy is whether two plots of land stated in the plaint to measure 633 bighas belong to *Baraset* or to *Babupore*.

The plaint was filed on the 9th of April, 1881. It states that the disputed land remained under water for a long time, and that the Plaintiff's predecessors were in possession by receipt of the fishery rent; that a dispute arose between the predecessors of the Plaintiff and those of the Defendants with regard to the thakbust of the lands, and that a mutnaza case, No. 401 of 1857, was instituted before the Survey Deputy Collector, was decided in favour of the Plaintiff's father on the 22nd of May, 1857, and the decision confirmed in appeal.

The sixth and eighth paragraphs of the plaint are as follows:—

"6. From 1276 the south-eastern portion of the aforesaid bil began gradually to silt up. The silted-up land used to remain waste and covered with dense jungle in the dry season, and in the rainy season overt acts of possession were exercised on the part of the Plaintiff's father by receipt of the fishery rents of that place. The *Roy* Defendants, with a view to dispossess the Plaintiff's father from the said lands, and having recourse to divers acts of fraud and injustice, exceeded the boundaries of their estate of mouzah *Baraset*, as fixed by the thakbust authorities, and after gradually bringing the said silted-up bil land under cultivation and making settlements thereof, they have continued without any right to possess and enjoy the same from the month of Srabun, 1278."

"8. As the act of dispossession commenced in Srabun, 1278, and as the Plaintiff is not in a position to ascertain the exact time when each plot of land became cultivable, he takes the cause of action in this case against the *Roy* Defendants to have arisen from the said month of Srabun, 1278."

The Plaintiff adds statements to account for the delay in suing,

but it is not material to consider them. He prays to recover possession on the Plaintiff's zemindari right, and for mesne profits. A description of the property is added in a schedule, of which the only thing now needful to say is that the larger of the two plots is described as lying south of *Betaga* shore.

The Defendants put in a written statement, claiming the disputed land as belonging to *Baraset*, denying in effect that the land sued for is the same as the land awarded to *Babupore* in May, 1857, and contending that inasmuch as they do not admit that the Plaintiff or his predecessor was ever in possession of the disputed land, the suit is barred by limitation.

The questions raised by the pleadings are two: First, do the lands now in suit form part of the mutnaza lands, *i.e.*, those comprised in the proceedings of 1857, called the mutnaza suit? If they do not, the whole foundation of the Plaintiff's case fails. If they do, the second question arises: How far is the Plaintiff's title barred by the possession of the Defendants, or by his own non-possession?

The order made in the mutnaza suit, with preliminary statement, is set out in the Record. The then zemindar of *Babupore*, the present Plaintiff's father, complained that the talookdar of *Baraset* had caused 400 or 500 bighas of land belonging to *Babupore* to be measured with *Baraset* in the thakbust proceedings. The Court caused a plan to be made, and the Survey Deputy Collector, *Taruck Nath Ghose*, went in person to view the spot and to investigate the matter in dispute. He found that on the northern boundary of *Baraset* was a khal named *Nowdara*, and that the mutnaza lands lay north of that khal, and west of the *Bil Betaga*, and that the Plaintiff received the julkur rents of *Bil Betaga*, &c. He ordered that the map should be corrected by enclosing the said land within the boundaries of mouzah *Babupore*.

The Defendants appealed to Mr. *Watson*, the Survey Superintendent, who, on the 1st of January, 1858, made an order confirming the Deputy Collector's order, on the same grounds. The thak map was then altered, and is numbered 742 in this Record. The mutnaza map is also in the Record numbered 751.

When this suit came before the Subordinate Judge of *Jessore*,

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he sent an Ameen to survey the ground and make a plan of it, but his work was not satisfactory and was set aside. Another Ameen was sent, whose map, numbered 326, is in the Record. The Subordinate Judge states, and it so appears from the map No. 326, that, according to this Ameen's survey, nearly the whole of the land now in suit lies within the circuit of mouzah *Babupore.*

The Subordinate Judge subjected the various maps and also the oral and other documentary evidence to a very long and minute examination, and he came to the conclusion that the Ameen's map was wrong, that the thak map also was wrong, and that the lands in suit formed no part of the mutnaza lands. His main reason appears to be that the lands in suit are described in the plaint as being to the south of the *Betaga* shore and khal, and were so pointed out to the Ameen by the Plaintiff's men; whereas, he says, according to the mutnaza map the shore is to the south of the mutnaza lands. He also decided that there was no evidence to prove the Plaintiff's possession of the disputed lands within twelve years of the suit, and that the Defendants have proved their possession for more than twelve years.

Their Lordships may say at once that, though there are difficulties in the question of identity, they cannot understand that particular difficulty which has impressed the mind of the Subordinate Judge. Seeing that the land has till within a few years been all covered with water; that it is now mostly covered with thick jungle so as to throw serious obstacles in the way of a survey; that there are formations of water on its northern, southern, and eastern extremities, of irregular shape, much hidden in parts by vegetation, and with names not well defined but differently given by different informants, there is plenty of ground for dispute. But their Lordships are unable to see any inconsistency between the mutnaza map and the description in the plaint. They find that the names *Betaga Bil*, *Betaga Khal*, and *Betaga Shore*, are used interchangeably to designate a water-course which in the mutnaza map is shewn on the north, the east, and the south of the mutnaza lands. At the south-west end of it the *Nowdara Khal* is marked, which appears to be in some seasons one with the *Betaga*, and in others separated from it.

In point of fact, the *Betaga Khal*, according to the mutnaza map, lies to the north of a large portion of the mutnaza lands, and of nearly, if not quite, the whole of that portion of the mutnaza lands which is now in suit. The Subordinate Judge seems to have been misled by looking at a marginal note on the map without the explanation afforded by the map itself. The note, apparently referring to the lands generally, says, "North of the *Betaga Khal* of *Nij Mouzah*"; and the map shews that the writer must refer to the southern branch of the khal. The Plaintiff then is justified in stating that he sues for lands south of the *Betaga Shore*, and though his people may easily have made mistakes in pointing out the land under circumstances calculated to baffle a skilled surveyor, no proof that they did so can be drawn from the fact that they pointed out land to the north of which lay water which they called, and which probably was, the *Betaga* shore or khal. These observations will dispose of a great deal of the argument pressed upon the Board by the counsel for the Appellants.

As regards the Subordinate Judge's finding on the question of possession, it is very much, and quite properly, mixed up with his finding on the question of identity. The evidence has a different bearing, according as it is supposed to apply to land which is, or to land which is not, portion of the mutnaza lands.

The Subordinate Judge dismissed the suit, and the Plaintiff appealed to the High Court. That Court considered it necessary that a fresh local inquiry should be held and a map prepared by a competent officer; and they appointed Mr. *Madge* to be a Commissioner for that purpose. Briefly stated, his instructions were to shew the boundary fixed by the thakbust map prior to the mutnaza case, and to ascertain the mutnaza lands, and the lands described in the plaint. The result of this commission was the preparation of two maps by Mr. *Madge*, of which No. 2 is now the important one, and a report by him, which is to be found in the Record. The Defendants took objections to the report, and the case came again before the High Court.

The High Court held that, notwithstanding the great difficulties in the way of a proper survey, Mr. *Madge* had accurately

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depicted the lines of the original thak survey as well as of the lands relating to the mutnaza case, and that his proceedings formed a reliable basis for determining this suit by the result of the mutnaza case. And as his map No. 2 shewed two plots of land, amounting to about 862 bighas, as forming part of the mutnaza lands, the Court gave the Plaintiff a decree for those plots with mesne profits.

As regards the question of possession, the view of the Court was that, until the land became fit for cultivation by the drying up of the water, they could not find that either party was in possession of any particular portion so as to define a boundary line between their estates; that the possession found in the mutnaza case must be held to have continued; and that the Plaintiff's title was now barred.

The Defendants now appeal from this decree; contending that, upon both the points in controversy, the Subordinate Judge is right and the High Court wrong. They complain that the High Court has trusted too implicitly to Mr. *Madge's* survey, and has not examined the other voluminous evidence to which the Subordinate Judge addressed himself. Their Lordships will first deal with the question of identity.

On this point, with reference both to this case and to several others of a like kind which have come before them, their Lordships think it right to express an opinion that in order to set aside the decision of the Court below, the Appellants should come prepared to shew clearly where it is wrong, and what other course is right. In boundary cases of this kind nothing is easier than to propound riddles which cannot be answered by merely looking at the maps, or reading the statement which appears in the Record. If it were enough to shew to this tribunal difficulties which the Respondent's counsel cannot explain, and then to contend that his case is not proved, he would labour under an unfair amount of burden. In such cases the local Courts have advantages over the remote ones. To a certain extent the same remark is true as between the Subordinate Judge and the High Court, but the High Court possessed a resource which this Board would be very reluctant to use again in this suit. They felt the local difficulties, and they met them by ordering a local survey

of their own. On the results of that survey they saw their way to affirm the Plaintiff's title. To induce this Board to disaffirm it, the Defendants ought to do something more than to shew that the Plaintiff's title is not free from doubts; they should at least give some acceptable explanation of the circumstances which have led the Court below to its conclusion.

Now that is exactly what the Appellants have failed to do. They can shew many difficulties of a kind which probably no amount of mapping or verbal description would avoid. Mr. *Madge's* map does not, so far as their Lordships can see, shew in terms, and on its face, the *Thackbust* line which was complained of and corrected in the mutnaza suit, nor the lands described in the plaint. But those objections were before the High Court, who were satisfied that Mr. *Madge* had shewn the things required; and, though it does not appear that Mr. *Madge* was present to explain his map, the Court could certainly have required his presence if any real difficulties had been felt on those points.

But the difficulty of the Defendants is this. It is certain that the Plaintiff recovered land from the Defendants in the mutnaza suit. Where are the mutnaza lands? According to the thak map, the mutnaza map, the Ameen's map, and Mr. *Madge's* map, they are so placed as to correspond more or less closely with the land now in suit. Observations have already been made on the arguments used to shew that there is error in the thak map and the Ameen's, and discrepancy between them and the mutnaza map. If the maps are all wrong, where shall we place the mutnaza lands? The Defendants say that they should be placed somewhere to the north of the northern branch of the *Betaga Khal*, in a region which no one of the maps enables us to ascertain. To that theory there seem to be two strong objections.

The first is, that though Mr. *Madge* was occupied in surveying the ground from the 18th of May to the 18th of June, and though from the 19th of May he was attended by the Ameen of the Defendants, and from the 26th by their surveyor, no one objected that his operations were being conducted in a wholly wrong place, so that the work would all be thrown away.

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The second is, that we cannot have any evidence of the position of the mutnaza lands so good as the mutnaza map, and where it speaks intelligibly we ought to follow it. Now, the mutnaza map gives as a landmark a mound called *Gozmara Tek*, not on the face of the map, but in the marginal note before referred to, which says that the land lies to the south of it and to the north of *Betaga Khal*. The *Gozmara Tek* does not appear in the thak map or in the Ameen's. But Mr. *Madge* discovered it, and clearly identified it as one of the stations used in the mutnaza survey; and he has placed it at the northernmost point of the mutnaza lands. According to the mutnaza map the lands cannot be between the *Gozmara Tek* and the north branch of the *Betaga Khal*; there is no space for them there; and the map-maker places them between the site of the Tek and the south branch of the Khal. If a line be drawn on the mutnaza map from west to east through the *Gozmara Tek* placed at the point now ascertained by Mr. *Madge*, and if a parallel line be drawn at a tangent to the southernmost portion of the *Betaga Khal*, the whole of the mutnaza lands will be found between these two lines. Another important landmark on the mutnaza map is the *Nowdhara Khal* at the extreme south-west. It is not marked on the thak map, or on the Ameen's, but it was ascertained by Mr. *Madge*, and treated by him, in the presence of the agents, as the south-western boundary of the lands; for from that point he began to work due north; and it is so set down in his map. It appears, therefore, that Mr. *Madge* found these two cardinal points on the north-east and the south-west, just where they ought to be if the Plaintiff's theory of the lands is correct, and where they could not be if the Defendants' theory is correct.

The Defendants have insisted very earnestly that Mr. *Madge* has passively followed the thak map to produce his own. But his report has not been impugned and must be taken to speak the truth. It shews a laborious survey lasting for a month and carried into minute detail. Moreover, the points just now insisted on, to say nothing of some small variations having the effect of throwing some five bighas out of the thackbust boundary, shew that the survey is to be taken as an independent and original work, though of course Mr. *Madge* availed himself

of the mutnaza map and field-book, as indeed the High Court directed him to do.

Much reliance was placed at the Bar on the expression by the High Court of their agreement with the Subordinate Judge that the thak map does not accurately shew the lands of the mutnaza case. In the absence of explanation their Lordships do not know what inaccuracy is referred to, unless it be the small variations just noticed. It is certainly not the inaccuracy, or rather the glaring error, supposed by the Subordinate Judge; and it is something which is consistent with the accuracy of Mr. *Madge's* map. It appears to their Lordships that in deputing Mr. *Madge* the High Court took the best course open to them; that in the absence of proof that there are specific and material errors in his map, they were right to rely on it; and that their conclusion on this part of the case ought to be maintained.

The next question is whether the title of the Plaintiff which, accompanied by possession, was affirmed in 1857, has been lost by subsequent non-possession on his part, or adverse possession on the part of the Defendants. In this controversy the Defendants start with the advantage that the Plaintiff admits their possession from a time nearly ten years before the suit. Still there remain two years during which possession must be proved, or inferred on legal grounds, on one side or the other. The Plaintiff claims, and the High Court has held, that presumption must be in favour of the title and former possession. The Defendants claim that it should be in favour of the state of things existing for ten years. Each party has tendered positive evidence on the point.

The condition of the land is such as to offer great difficulty in the proof of possession. At the date of the thakbust the whole was under water, together with a contiguous larger tract. The only use or enjoyment consisted in fishing. There has been a gradual slow and still incomplete conversion of this lake into swamp, and of swamp into habitable land; and it is obvious that during such a process there may be parts of the land which for many years are not used at all for any purpose of enjoyment. Mr. *Madge's* map shews two plots divided by a channel called the *Bhaisa* or the *Arpangasia*. Plot 1 consists of 829 bighas

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lying to the west of the *Arpangasia*; and this plot is still for the greater part in a state of swamp and jungle, though portions of it were used for growing paddy as early as the autumn of 1871, whether earlier or not is matter of dispute. Plot 2 consists of 32 bighas lying to the east of *Arpangasia*; and there is evidence that land in this quarter, whether actually land of plot 2 or not is again matter of dispute, was dried by the cutting of a channel about the years 1868 or 1869.

The Defendants contend that though the Plaintiff shews title and possession in 1857, he still must fail unless he can shew acts of possession and enjoyment later than the 9th of April, 1869, or that he must prove the act of dispossession by the Defendants later than that date. Their counsel went so far as to argue that if the land, being in a state of swamp and jungle, had been left wholly unused for twelve years, and then a stranger were to settle upon it, the Plaintiff could not assert any title against him.

The High Court do not enter upon any discussion of this question. In their view of the evidence, it does not enable them to find that either party was in possession of the sheet of water so as to define any boundary line between their respective estates. Therefore, they conclude that, so far as the lands now claimed are identical with the mutnaza lands, the possession found in 1857 must be taken to have continued, and to shew the boundary line of the two estates.

After hearing a great deal of argument to impugn the view of the High Court, their Lordships are not disposed to differ from it. It is in accordance with the decision in the case of *Runjeet Ram Panday* v. *Goberdhun Ram Panday* (1) a case which fell under the *Limitation Act* passed in 1859, when the Plaintiff (as pointed out in *Rao Karan Singh* v. *Rajah Bakar Ali Khan* (2)) was subject to a burden of proof heavier than that established by the *Limitation Acts* of 1871 and 1877. But their Lordships say no more upon this point; nor do they feel called upon to examine the subsequent cases, because they think that, even assuming the burden of proof upon the Plaintiff to be such as the Defendants contend for, he has sufficiently discharged it.

(1) 20 W. R. 29, 30. (2) L. R. 9 Ind. App. 99.

Their Lordships will first consider the evidence adduced by the Defendants. Seven of their witnesses have been selected by their counsel, doubtless those who are the most effective. Five of them speak to Plot 1 and two to Plot 2. Six of them are tenants of the Defendants, and one (witness No. 10) was present at the Court Ameen's survey. They were examined in May, 1884. Let us first take the five who speak to Plot 1. As regards time, one witness, No. 14, specifies no time of occupation; one, No. 7, proves too little, only nine or ten years. The other three prove too much; No. 10 has seen tenants there twenty-seven or twenty-eight years previously, *i.e.*, before the thak survey, when it is agreed on both sides that all was under water; No. 18 carries the settlement by habitation back to 1859 at latest, No. 16 to 1861 at latest; but, as has been stated, paddy planting was carried on in 1871, so that down to that time the land must have been under water and uninhabitable. As regards the situation of Plot 1, No. 7 and No. 10 do not fix any. The other three fix it in village *Bhawanipore*, which is in mouzah *Baraset*; and one of them, No. 16, adds that *Nowdhara* is to the north of the plot. Now *Bhawanipore* does not appear on the earlier maps; but it is marked on Mr. *Madge's* map, outside the mutnaza lands. And *Nowdhara* is one of the cardinal points ascertained by him as the south-west extremity of those lands. There is no reason to suppose that these witnesses were consciously telling any untruth. But there is very strong reason to conclude that they were speaking of other land, an error not difficult to fall into, perhaps not easy to avoid, in such a country. There is, then, in their Lordships' judgment, no evidence at all given by the Defendants which touches Plot 1.

Of the two witnesses who speak of Plot 2, No. 8 holds 27 bighas of the Defendants, 17 of which are again held of him by No. 4. No. 8 says that he got his grant twenty-one or twenty-two years ago, *i.e.*, in 1862–63; that his land was then covered with water; that within two years it became fit for cultivation; and that it became dry after a Khal, which he calls the *Kata Khal*, was cut fifteen or sixteen years ago, *i.e.*, in 1868–69. The cultivation he speaks of as possible in 1864–65 must have been

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for paddy, though he does not say so; neither does he say that it actually was cultivated; he does not cultivate personally, he says. No. 4 (who is forty-five years old) says that his father took 13 bighas eighteen or nineteen years ago, *i.e.*, in 1865–66, and built a house on it a year after. He took the other 4 bighas two or three years later. "When I first saw my land it was in a cultivated state. That was some eighteen or nineteen years ago." He does not speak of any alteration of the surface, but speaks of his cultivation as if it were the same thing as that of nineteen years back.

It is impossible not to feel serious doubt of the value of this evidence. The lessee tells us that the land was cultivated at a time not later than 1866 and was built on at a time not later than 1867, while the lessor says that either a year or two years after the latest of those dates it was covered with water. And such events as the taking of a farm, the building of a house, and the drainage of a lake, are not likely to be forgotten in the life of a countryman.

As regards the situation of their land, both witnesses say that it is east of *Arpangasia.* No. 8 tells us nothing more. No. 4 says that it lies within the little disputed plot, but how he makes that out does not appear. There is no further identification. It was pointed out by Mr. *Arathoon* that the Ameen's measurement of the land in suit was 1215 bighas, and of Plot 2, 71 bighas, the bulk of which he made out to be mutnaza lands; whereas Mr. *Madge's* survey only gives 829 bighas for the mutnaza lands now in suit, and for Plot 2, 32 bighas. It is therefore quite possible that when witnesses speak of the "land in dispute" they may be speaking of some of that excess portion which was in dispute before the Ameen and before the Subordinate Judge, but which is not in Mr. *Madge's* map or in the decree. This is conjectural, but it introduces an additional element of uncertainty into the Defendants' case.

It can hardly be said of Plot 2, as of Plot 1, that there is absolutely no evidence which can be applied to it; but it is so extremely weak that, even if uncontradicted, it would hardly advance their case.

The Plaintiff's evidence, on the other hand, is of a character

which, having regard to the nature of the land, is as substantial as can be expected. It is proved clearly that fishery leases were granted from 1861 onwards by the Plaintiff or his predecessors at substantial rents. There can be little doubt that these leases covered Plot 1, because the Plaintiff's witness No. 6 shews that he was lessee in 1871 when the Defendants' tenants planted paddy, apparently for the first time; and that, on account of this encroachment, he obtained an abatement of rent from the Plaintiff. The place of encroachment he describes as being the south-east corner of *Betaga Bil.*

That the leases covered Plot 2 is not made clear by any positive evidence. But seeing that the whole of the mutnaza lands were covered with water in 1857 and afterwards, apparently down to 1868–69, the proper inference is that they did include Plot 2. And as the Plaintiff's evidence is in accordance with, and is aided by his title and previous possession, which is now made clear, and is not countervailed by anything of the slightest weight on the Defendants' part, their Lordships hold that the evidence clearly applying to Plot 1 must be taken to apply to the whole of the mutnaza lands now in suit.

They will humbly advise Her Majesty to dismiss the appeal, and the Appellants must pay the costs.

Solicitors for Appellants: *Sanderson, Holland, & Adkin.*

Solicitors for Respondent, *Gobind Chunder Roy*: *T. L. Wilson & Co.*

J. C.*
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June 23

BIRJ MOHUN THAKOOR AND ANOTHER APPELLANTS;

AND

RAI UMA NATH CHOWDHRY AND OTHERS RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Code of Civil Procedure, ss. 311-313—Remedy for Fraud of Purchaser at a Sale in Execution.

Where a purchaser at a sale in execution alleges that he has been induced by fraud to pay a larger price for his purchase than he otherwise would have done, his remedy is not under sects. 311 to 313 of the Code of Civil Procedure; and the Judge must confirm the sale. A summary order to set it aside may be reviewed under sect. 622.

APPEAL from an order of the High Court (Jan. 30, 1888) reversing an order of the Subordinate Judge of *Bhagulpore* (March 21, 1887).

The order reversed was made on the application of the Appellants, and was to the effect that the execution sale, at which they had purchased a property called *Colgong*, should be set aside.

They applied on the ground that they had been misled as to the extent of the property sold, the judgment debtors having falsely represented to them that their whole 8 annas share was going to be sold. The shareholders and judgment debtors opposed it on the ground that sect. 313 of the code did not apply, and that no other section had been alleged to be applicable. The Subordinate Judge held that the object of sect. 313 was to relieve auction purchasers where the consideration money had failed, and that independently of that section there was an inherent power in the Court to prevent the Applicants being defrauded.

In appeal the High Court ruled that sect. 313 did not apply.

"The operation of that section is in express terms limited to cases in which the judgment debtor has no saleable interest in the property sold. In the present case, the complaint is not

* *Present:*—LORD HOBHOUSE, LORD MORRIS, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

that the judgment debtor had not a good title to the property sold, but that the purchaser was led into a mistake as to what he was buying. Sect. 311 has no application, for it empowers no one but the decree-holder, or one whose property has been sold, to seek the intervention of the Court. As to the inherent power of Courts to prevent one party to the proceedings before it from taking unfair advantage of another by fraud or misrepresentation, it is unnecessary to say anything beyond this, that a Court can in general make orders in a suit only as between parties to the suit. A purchaser at an execution sale is not a party to the suit, and the only case in which the Court is empowered summarily to set aside a sale at his instance is that provided for by sect. 313. We express no opinion as to whether the view taken of the facts by the Subordinate Judge is correct, or whether, if so, the purchaser has any remedy. We only hold that the summary order made in this case could not properly be made."

C. W. Arathoon, for the Appellants, contended that the High Court had no jurisdiction to entertain the appeal unless the order had been made under sects. 313 or 311. Otherwise the order was final, and could only be set aside under sect. 622 of the Code, and the application was not made to the High Court to exercise special jurisdiction thereunder. The misrepresentation from which the Appellants had suffered was good ground for the Subordinate Judge refusing to confirm the sale without investigation. It was unnecessary to apply under sect. 313; the duty of the Court was to ascertain if such a sale had taken place which it ought to confirm.

Reference was made to *Durga Sundari Devi* v. *Govinda Chandra Addy* (1); *Muhammad Yusuf Khan* v. *Abdul Rahman Khan* (2); *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh* (3); *In re Ramessuri Dossee* (4); *Hira Lall* v. *Karim-unnissa* (5).

The Respondents did not appear.

(1) Ind. L. R. 10 Calc. 368, 369, 372.
(2) Law Rep. 16 Ind. Ap. 104.
(3) Law Rep. 11 Ind. Ap. 237.
(4) Ind. L. R. 6 Calc. 103.
(5) Ind. L. R. 2 Allah. 780.

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BIRJ MOHUN THAKOOR v. RAI UMA NATH CHOWDHRY.

The judgment of their Lordships was delivered by

LORD HANNEN:—

It is now conceded that sects. 311 to 313 of the Civil Procedure Code do not apply in this case. Sect. 311 is limited strictly to "the decree-holder or any person whose immoveable property has been sold," which the present Appellant is not. Sect. 313 applies to the purchaser, and its scope is limited to the case of a person whose property is purported to be sold, and who had no saleable interest therein, which is not this case.

Here there was an order for sale, and the property was put up for sale, but there was no order confirming the sale. Under sect. 312, if no such application as is mentioned in sect. 311 is made, there is only one duty left to the Court, namely, to pass an order confirming the sale as regards the parties to the suit and the purchaser. The Subordinate Judge refused to do that, and set aside the sale, and directed the purchase-money to be refunded on certain terms. In so doing he declined to exercise a jurisdiction which he had, and exercised one which did not belong to him, and consequently his judgment was liable to be reviewed by the High Court under the 622nd section of the Code of Civil Procedure.

It does not, however, follow that the Appellant is without remedy, but he must select the appropriate remedy. Not having a remedy under the Code, which provides only for the particular cases named therein, he still has the right to have the sale set aside, if it be true that he has been induced by fraud to pay a larger sum for the property purchased than he would have had to pay if he had not been so deceived.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

Solicitors for Appellants: *T. L. Wilson & Co.*

ZAKERI BEGUM . . . . . PLAINTIFF;

AND

SAKINA BEGUM AND OTHERS . . . . DEFENDANTS.

J. C.*
1892
March 29, 31; *May* 28.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Indian Evidence Act, 1872, *s.* 32—*Admissibility of a Mahomedan Register of Marriages—Proof of stipulated Dower.*

Held, that a register of marriages having been made by a Mujhtahid in the discharge of his professional duty and kept by the Kazi, is admissible and relevant evidence within sect. 32 of the *Indian Evidence Act*, 1872, in a suit to recover dower between the parties to a marriage recorded therein:—

Held, upon all the evidence in the case including the said register, that the High Court were in error in reversing the decree of the lower Court to the effect that the stipulation dower was Rs.50,000, and that the Plaintiff was entitled thereto.

APPEAL from a decree of the High Court (June 30, 1885) varying a decree of the Subordinate Judge of *Patna* (Feb. 29, 1884).

The facts are stated in the judgment of their Lordships.

Branson, for the Appellant, contended that the evidence proved that dower had been agreed upon at Rs.50,000 at the time of the marriage. Also that the entry of that amount in the marriage register was admissible evidence in support of that case. He cited *Baillie's* Mahomedan Law, vol. i., pt. 1, p. 117, as to pretended dowers, *i.e.*, where a larger sum is stated in public than has been agreed in private: *Mussumat Mulleeka* v. *Mussumat Jumeela* (1); *Mulka Bo Alum Nowab Tajdar* v. *Mirza Jehan Kudr* (2); *Sugra Bibi* v. *Masuma Bibi* (3).

Doyne, and *C. W. Arathoon*, for the Respondents, contended that on the evidence the Appellant had failed to prove that her dower

* *Present:*—LORD MACNAGHTEN, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

(1) Law Rep. Ind. Ap. (Suppl.) pp. 135, 140.

(2) 10 Moo. Ind. Ap. 252.

(3) Ind. L. R. 2 Allah. 573, 579.

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was fixed at Rs.50,000 at the time of her marriage. Even if she had proved it, the amount was excessive, and should have been reduced. The *Oudh Laws Act*, 1876, had not been passed, and under the *Punjab* Code the Court had power to decree a reasonable instead of an excessive sum, which Rs.50,000 is shewn to have been according to the customs and usages of *Oudh*. The marriage register, which was the evidence chiefly relied on by the Appellant, was not admissible in evidence (see sect. 32 of the *Indian Evidence Act*, 1872). The register was begun after the annexation of *Oudh*. The entry relied on as well as entries in general were made, not by the Mujhtahid, but by his servant, the day after the marriage, and not when the marriage took place. The book was kept by the darogah of the Mujhtahid, an officer who was constantly being changed. The entry if admitted did not prove the Appellant's case.

Branson, replied.

1892
May 23.

The judgment of their Lordships was delivered by

LORD HANNEN:—

The Plaintiff in these proceedings (the present Appellant) is the sole widow of *Khaja Mahomed Ismail Khan*, a Mahomedan zemindar, resident at *Patna* in *Bengal*. The action was brought in the Court of the Subordinate Judge of *Patna*, against the heirs of the deceased *Mahomed Ismail*, who are in possession of his estate, to recover from them Rs.50,000, the amount of the Plaintiff's dower, alleged to have been agreed upon at the marriage, and unpaid at the death of her husband. The marriage took place on the 19th of July, 1867, at *Lucknow* in *Oudh*, where the deceased was staying on a visit. The deceased died at *Patna* on the 14th of November, 1880.

The Defendants in their defence alleged that the amount of dower agreed on at the marriage was not Rs.50,000, but Rs.5000, and that this was paid in the lifetime of the deceased. They also contended that as the marriage took place at *Lucknow*, the contract of dower was regulated by the usages and customs of *Oudh*, and that by those usages and customs the agreed amount of dower, if excessive, might be reduced by the Court to an

amount suitable to the circumstances and position of the husband and wife, and they claimed that if the agreed dower was Rs.50,000 it was excessive and should be reduced.

The material issues in the cause were: (1.) What was the amount of dower? (2.) Was it paid in the lifetime of the husband? (3.) Do the usages and customs of *Oudh* govern the case, and if so, was the agreed dower excessive?

In support of the Plaintiff's case, of ten witnesses called, seven were present at the marriage. These seven, as might be expected, are all related to the Plaintiff. They all agree that the dower was fixed at Rs.50,000, and that this was the minimum dower used in the Plaintiff's family, and it was proved that her sister had received a much larger dower. Their statements are all consistent with one another, except in one particular, namely, whether the dower was prompt or deferred. As the witnesses were speaking of what had occurred sixteen years before, it does not appear to their Lordships that this discrepancy should invalidate their testimony on the more important question in dispute, of the amount of dower agreed upon. The question whether the dower was prompt or deferred, only affects the reliance to be placed on the witnesses' recollections, as the Plaintiff was in any case not bound to sue for her dower till her husband's death, and it is not surprising that she did not do so sooner.

In addition to the testimony of the witnesses present at the marriage, the Plaintiff offered in evidence the register of marriages kept by the Kazi, in which this marriage is recorded. No objection was taken, when the witnesses were examined, to the admissibility of this register; on the contrary, the Defendants' pleader required that it should be inspected by the Court, as he alleged that it shewed that the dower was at first entered as Rs.5000, and that it had been altered to Rs.50,000. Some objection seems to have been taken on appeal before the High Court, as that Court discusses the value of the register on the assumption "that all the suggested difficulties about the admissibility of this document are removed." What those difficulties were does not appear; but their Lordships are of opinion that the register was admissible and relevant evidence, within the

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meaning of the 32nd section of the *Indian Evidence Act* of 1872, as having been made by the Mujhtahid in the discharge of his professional duty. This particular register appears to have been kept since the annexation of the province, and all marriages are recorded in it; it contains columns for the names and descriptions of the parties, the names of the vakils of the bride and bridegroom respectively, and the amount of the dower, together with the date of the marriage.

It appears from the evidence of *Syed Mahomed Ibrahim*, by profession Istahad or priest, that the register was kept at the time of the marriage by his father, *Syed Mahomed Taki*, then the priest, who is now dead, and that it has been kept since by the witness himself. The witness acted as the vakil of the bride, and his father was the vakil of the bridegroom; they both of them read the nika, or marriage service. Speaking of the practice, the entry, he says, is made in the register on the day following the night of the marriage, when, as in this case, it is celebrated late at night. The witness, on looking at the entry of this marriage in the register, says that it is in the handwriting of *Yad Ali* his servant, formerly servant of his father, and that the amount of dower was at first written Rs.50,000, and that it has been altered to Rs.5000. The witness does not recollect the amount of dower fixed at the time of the marriage.

Yad Ali stated that he had no personal knowledge of the marriage, excepting the recording of it in the register, which he did by the order of *Syed Taki*, since deceased, whose writer and general agent the witness then was, as he still is of *Syed Ibrahim*, the son. He made the entry in question the morning after the marriage. When the witness was examined under commission at *Lucknow*, the original register had not been obtained from the *Patna* Court, where it had been deposited, but the witness identified a document, Exhibit B, as having been made by him and copied from the register, and he stated that the register contained the entry as detailed in that document.

The witness wrote the portion of Exhibit B, which he copied from the register on the application of *Mirza Asgar Hossein*. The witness's statement of what was the amount of dower recorded by him in the register was objected to, without the production

of the register. The original register was afterwards produced, and *Mirza Asgar Hossein*, on whose application Exhibit B, copied from the register, was obtained, was examined and cross-examined as to that document. In it the dower is stated to be Rs.50,000. The exact time when this copy was made does not appear, but it was not long before the commencement of these proceedings. *Mirza Asgar Hossein* was one of the Plaintiff's witnesses present at the marriage, and he proves that the dower of Rs.50,000 was agreed to by *Mahomed Ismail*, the deceased husband of the Plaintiff. At some time not specified, after the death of *Mahomed Ismail*, this witness applied to *Syed Ibrahim*, the priest who had charge of the register, for a copy of the entry of the marriage. The witness obtained from *Yad Ali* the Exhibit B. Another more formal copy being required, he went with one *Mahomed Zaki* to *Syed Ibrahim* to obtain it; *Yad Ali* produced the register, and asked *Mahomed Zaki* to copy it. The witness then saw the register, and it contained Rs.50,000 in the column of mohur (dower) "clearly Rs.50,000. Now it appears a little blotted, which makes it like Rs.5000."

Mahomed Zaki says that he went with *Asgar Hossein* to *Syed Ibrahim*, and saw the register, and copied the entry of the marriage at *Yad Ali's* dictation. "It was Rs.50,000. It has been altered."

This was the evidence for the Plaintiff, and it appears to their Lordships clearly to establish the Appellant's case, unless its effect can be shewn to be overcome by clear and consistent counter testimony.

For the defence *Mahomed Askeri* was called. He is a nephew of the deceased, and is one of the Defendants. He states that when *Ismail Khan* was ill, he said in the presence of the Plaintiff that the dower was Rs.5000, and that it was paid. Three or four years after, when again ill, he said the same in her presence; other persons (named but not called) were also present.

Munnu Khan, a servant of the deceased *Ismail Khan*, says that he went with him to *Lucknow*. At the time of the marriage he was with *Ismail Khan*. "I do not know the position of the Plaintiff. I saw her house. It was in a very dilapidated state. Her dower was fixed at Rs.5000." In cross-examination he

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stated that since the dispute the Plaintiff was not agreeable to his stopping in the house, and so he went away to the Defendants.

Mir Khurshed Ali, a professional story-teller, says that he went to the marriage. The dower was fixed at Rs.5000. "*Syed Ibrahim* asked *Mahomed Ismail*, 'The dower of *Mussumat Zakeri Begum* is Rs.5000—do you agree to this?' *Mahomed Ismail* replied, 'I agree.'" The dower of witness's first wife was fixed at Rs.30,000.

Mir Wazir Jan says he accompanied *Mahomed Ismail* to *Lucknow*, and was present at the marriage. "The dower was fixed at Rs.5000 . . . . On a sudden the amount of dower was fixed in the wedding party. . . . There was no conversation about the dower before."

These three were all the witnesses for the Defendants said to have been present at the marriage. The only other witness who speaks on the subject of the dower is *Mirza Yusuf Beg*, who relates a conversation with *Mahomed Ismail*, which is not relevant evidence.

This closed the case for the Defendants.

Upon this evidence the Subordinate Judge, in a carefully considered judgment, came to the conclusion that the dower was fixed at Rs.50,000 and had not been paid, and on inspection of the register he says that "there is not the least doubt that 50,000 has been changed to 5000." He also held that the law of *Oudh* was not applicable to this case, but that if it were, the amount of dower was not extravagant, and that no ground had been shewn for reducing it.

On appeal the High Court reversed the judgment of the Subordinate Judge, but gave the Plaintiff a decree for Rs.5000 out of her husband's estate, thus rejecting the Defendants' evidence that the dower had been paid.

The reasons given for refusing to credit the Plaintiff's witnesses are: (1.) That the Plaintiff was not "married with the publicity of a shadi marriage," and that after the marriage she was only treated with the respect "naturally paid to a second or nika wife during the lifetime of the first," and that under these circumstances the amount of dower was very large. No evidence

was given on this subject, and no authority has been referred to in support of the suggestion that a simple nika marriage amongst Mahomedans would indicate inferiority on the part of the wife to one "married with the publicity of a shadi marriage." (2.) That there was no kabinnama, or written contract; but it was proved in the course of the Plaintiff's case, and not contradicted by any witness for the Defendants, that though the dower is always fixed, there are sometimes written contracts of dower and sometimes not. Here, as it is alleged, the dower was fixed and written in the register. (3.) That the Plaintiff herself did not give evidence. But having regard to the unwillingness of Mahomedan ladies to give evidence, and the fact that the dower would naturally be arranged by her relatives, several of whom were called, their Lordships do not consider that the Plaintiff's absence as a witness should invalidate the testimony of those who were called. (4.) That the male relative, in whose house and in whose charge she was living at the time of the marriage, has not been called. There appears to be some misapprehension as to this. The marriage is proved to have taken place in the house of *Mahomed Mirza, alias Miran Saheb*, and this witness has been called, and proved that *Mirza Mahomed Wazir*, the oldest member of the Plaintiff's family, settled this marriage a fortnight before it took place, and that this person is dead. (5.) That the witnesses differ as to whether the dower was prompt or deferred. This has been already dealt with.

Then it is said that the Plaintiff's witnesses are "contradicted on the other side by other witnesses of much the same kind and class as the Plaintiff's," and the judgment of the High Court proceeds: "Under these circumstances, if the matter had stood thus, we should have found it impossible to accept the Plaintiff's story," and the Judges say that as "the Plaintiff's witnesses were examined on commission," they are "in the same position in estimating their evidence as the Judge of the Court below was." It is to be observed, however, that the witnesses for the defence were examined *vivâ voce* before the Subordinate Judge, and that one of the Defendants was disbelieved on a most material point, on which he gave distinct evidence, namely, that the deceased stated twice in the presence of the Plaintiff that the dower had

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been paid. This evidence must have been equally discredited by the Judges of the High Court, since they gave the Plaintiff judgment for the Rs.5000, said to have been already paid, and this notwithstanding the absence of the Plaintiff as a witness, on which adverse comment was made. This does not merely invalidate the evidence as to that particular fact, but casts doubt on the Defendants' case. The Judges then proceed to consider the effect of the register, and say, that "assuming that all the suggested difficulties about the admissibility of this document are removed, it proves nothing." The register was produced for the inspection of the Judges, and they accept the evidence of *Syed Ibrahim*, against whom they say no suspicion was suggested, that the amount had been altered from 50,000 to 5000, but they say that there is nothing to shew that this was not a *bonâ fide* correction of a mistake made at the time. This is scarcely reconcilable either with the evidence of those who saw the register as already noticed, or with the view presented, apparently for the first time, in the following passage in the judgment: "Having regard to the place where the marriage was celebrated, and all the circumstances connected with it" (what these were is not stated), "we think it just as likely that if Rs.50,000 was entered in the register at the time, it was not entered as any record of an actual contract to pay Rs.50,000, but as a sort of form of courtesy intended to raise the honour and dignity of the parties."

Their Lordships can find no justification for this suggestion, which has not been made either on the pleadings or by any of the witnesses examined. The evidence is uncontradicted that the Plaintiff was of good family, and that a dower of as much as Rs.50,000 was usual in it. Her sister received a much larger dower, and others as large are proved.

The Judges of the High Court next consider the evidence of the three witnesses who state that the register remained unaltered from 50,000 at a recent date, and criticise their testimony unfavourably, because they differ as to the order in which copies were made; and they speak of *Zaki* as "a person who had no connection with the matter at all, a mere outsider, whose intervention is by no means satisfactorily explained." The order in which the copies were made is a very unimportant matter, in

which disagreement, if it exists, might easily arise, and there does not appear any necessity for further explanation of why an "outsider" was employed to examine the register and procure a copy.

The Judges conclude that this evidence appears to them "to be not of a satisfactory kind, but to leave the whole question as to when the alteration in the register was made in uncertainty." It is obvious, however, that it cannot be suggested that the alteration from 50,000 to 5000 was made in the interest of the Plaintiff, and their Lordships can see no reason for holding that the evidence of the three witnesses that the entry remained 50,000 at a recent date should be rejected.

The Judges of the High Court do not deal with the other points named, as the grounds relied on by them disposed of the case from their point of view. Their Lordships agree with the Subordinate Judge that the usages and customs of *Oudh* as to dower were not applicable to the marriage in question; but if they were, no reason has been shewn why the Subordinate Judge should in the exercise of his discretion have reduced the dower in this case. No evidence was given of the value of the husband's property, or any other relevant circumstances tending to shew that Rs.50,000 was excessive. Dower is often high among Mahomedans, to prevent the husband divorcing his wife, in which case he would have to pay the amount stipulated.

After a careful consideration of the whole evidence in the case, and adopting the view that the testimony of the Plaintiff's witnesses have received material corroboration from the entry in the priest's register of marriages, their Lordships are of opinion that the judgment of the High Court should be reversed with costs, and that of the Subordinate Judge restored, and they will humbly advise Her Majesty accordingly. The Respondents, other than the Deputy-Registrar of the High Court, will pay the costs of this appeal.

Solicitor for Appellant: *J. F. Watkins.*

Solicitors for Respondents: *T. L. Wilson & Co.*

J. C.*
1892
March 25; May 14.

PROSUNNO COOMAR SANYAL AND ANOTHER . . . . . PLAINTIFFS;

AND

KASI DAS SANYAL AND OTHERS . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Sect. 244 Code of Civil Procedure—Suits by Auction Purchaser relating to Execution of Decree, barred.

Sect. 244 of the Civil Procedure Code bars a fresh suit in relation to the execution, discharge, or satisfaction of a decree. It does so in terms when the question has arisen between the parties to the suit in which the decree was passed; and it has been rightly held to apply when the question raised concerns the auction purchaser at an execution sale as well as the parties.

APPEAL from a decree of the High Court (Aug. 9, 1888) affirming a decree of the Subordinate Judge of *Pubna* (Aug. 10, 1886), which dismissed the Appellants' suit.

The Appellants were co-sharers in the *Futtehpore* zemindari. In execution of a decree obtained by him the Respondent *Protap Chunder Banerji* attached the whole of it. The Appellants and others alleged that they came to terms with him, and accordingly he sold the shares of those who were not included in the arrangement, and obtained satisfaction of his decree. The plaint alleged that he then, in collusion with the Defendants, got the sale set aside, again caused the whole zemindari to be attached, and subsequently sold. The Plaintiffs objected to their interests being attached. The Court executing the decree overruled their objection; the Judge in appeal confirmed its order; and the sale of the whole took place on the 10th of July, 1883. The order confirming this sale was dated the 30th of June, 1884, and on the 7th of April, 1885, the Appellate Court dismissed an appeal. The date of suit was the 6th of March, 1886. It was brought against the other co-sharers, the decree-holder, and the

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, and SIR RICHARD COUCH.

auction purchaser. The prayer was that the said sale should be set aside as illegal and fraudulent, with consequent relief.

The Defendants relied on limitation, and on sect. 244 of the Code, and denied fraud and collusion.

The Subordinate Judge held the suit barred by art. 12, 2nd schedule of Act XV. of 1877; since limitation ran from the confirmation of the sale by the first Court, and not from the order of the Appellate Court. Further, he ruled that sects. 13 and 244 barred the suit as regards the issue of fraud.

The High Court affirmed this ruling as to limitation. It also said that if the Plaintiffs had been able to make out a case of fraud they would have had three years from its discovery in which to do so; that the fraud alleged was against the decree holder and had been disposed of; while that against the other Defendants was too vague and general to enable any issue to be raised.

Doyne, for the Appellants, contended that the Appellants were not concluded by sects. 13 and 244. The allegations of fraud and collusion on which they relied in the suit were against all the Defendants, and could not have been disposed of by the two orders disposing of the Appellants' objections to the attachment of their shares. Besides, the suit is against the auction purchasers as well as the decree holder, raising a question between other persons than those who were parties to the suit in which the decree was made. In such circumstances, sect. 244 did not apply. Its object was to bar fresh suits between those who were parties to a suit still on the files of the Court, and did not include strangers to such suit within its scope.

The Respondents did not appear.

1892
May 14.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

The suit in this case was brought for the purpose of setting aside the sale of a zemindari in the district of *Pubna*, called *Futtehpore*, which was sold in execution of a civil decree on the 10th of July, 1883. The Subordinate Judge dismissed the suit

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PROSUNNO COOMAR SANYAL v. KASI DAS SANYAL.

on preliminary grounds, without going into the merits. The High Court at *Calcutta* affirmed his decree.

It appears that some time before 1880, the Respondent *Protap Chunder Banerji* recovered against the Appellants, and certain persons who were co-sharers with them in *Futtehpore*, a decree for possession of some lands in dispute, and also a money decree for mesne profits and costs. In execution of that decree *Futtehpore* was attached. Thereupon, as the Appellants allege, they and two other persons who were co-Plaintiffs in the suit before the Subordinate Judge, paid their quota of the judgment debt and came to an arrangement with the judgment creditor that their shares should be exempted from sale. The shares of the other co-sharers were alone put up for sale, and they were sold on the 10th of February, 1882. Afterwards this sale was set aside, the attachment was revived, a fresh sale took place, and on the 10th of July, 1883, the whole of *Futtehpore* was sold. The allegation in the plaint is that the setting aside of the first sale, the revival of the attachment, and the second sale in which the shares of the Plaintiffs were sold with the rest, were brought about by fraud and collusion on the part of the other co-sharers, the judgment creditor, and the auction purchasers, who were all made Defendants. No particulars of the alleged fraud and collusion are given. The charge is general and perfectly vague. If it means anything, it can only mean that the judgment creditor broke his alleged agreement with the Plaintiffs, and that the other persons alleged to have been implicated, being aware of the circumstances, took some part in the transaction.

Both Courts have held that the question which the plaint seeks to raise could only have been determined by the order of the Court which executed the decree, and that in such a case as the present a separate suit for the purpose of setting aside an execution sale is expressly forbidden by sect. 244 of the Civil Procedure Code.

Mr *Doyne*, who appeared for the Appellants, admitted that the question at issue was one "relating to the execution, discharge, or satisfaction of the decree." But he argued with much ingenuity that the suit was not barred by the provisions of sect. 244, because the question concerned the auction purchasers as much

as anybody, and therefore, as he contended, it could not properly be described as a question "arising between the parties to the suit in which the decree was passed." At the same time, he admitted that he was unable to produce any authority for his contention, and he also admitted that it was the common practice to make the auction purchaser a party to an application for setting aside an execution sale.

As the point appeared to be one of some importance, and the Respondents were not represented at the Bar, their Lordships thought it desirable, before giving judgment, to examine the reported cases which have arisen under sect. 244 of the Civil Procedure Code. An examination of those cases, of which it is only necessary to mention *Sakharam Govind Kale* v. *Damodar Akharam Gujar* (1), and *Kuriyali* v. *Mayan* (2), has satisfied their Lordships that the decision appealed from is in accordance with the construction which the Courts in *India* have uniformly placed on the section in question.

It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in *India* have not placed any narrow construction on the language of sect. 244, and that when a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit is interested in the result has never been held a bar to the application of the section.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed.

Solicitors for Appellants: *Wrentmore & Swinhoe.*

(1) Ind. L. R. 9 Bomb. 468. (2) Ind. L. R. 7 Mad. 255.

J. C.*
1892
May 31; July 2.

ABDUL GAFUR AND OTHERS . . . . . PLAINTIFFS;

AND

NIZAMUDIN AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BOMBAY.

Mahomedan Law—Invalid Wakfnama—Wakf Estate must be dedicated to Charity—Invalid Settlement.

According to Mahomedan law there can be no valid wakfnama without a substantial dedication of property to religious or charitable uses at some time or other.

Sheik Mahomed Ahsanulla Chowdhry v. *Amarchand Kundu* (Law Rep. 17 Ind. Ap. 28) followed.

Where the legal heirs of the settlor were the only objects of his bounty, and no possession was given in the lifetime of the settlor, the intention being to make the settled estate devolve from one generation of his descendants to another without its being alienable by them or liable to be taken in execution for their debts:—

Held, that the transaction was invalid either as a settlement, or, if made with consent of heirs, as a will.

APPEAL from a decree of the High Court (June 11, 1888), reversing a decree of the Assistant Judge of *Thana*, which affirmed a decree of the second class Subordinate Judge of *Panvel*.

The first Courts decided that the deed of the 6th of January, 1838, referred to in the following judgments, was valid, not as creating a wakf, but as a deed of settlement which conferred life estates upon the wife and daughters, with remainder to the next of kin. The High Court, on the other hand, held that the deed could not be supported as a wakf since it contained no provision for the ultimate dedication of all the property to religious or charitable purposes. As a mere deed of settlement the settlor had no power to create a series of life estates with remainder to his next of kin.

The judgment of the High Court was as follows:—

"The Plaintiffs sue as muttavallis, and also as next of kin of

* *Present*:—LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

the deceased *Karimudin*, to obtain possession of certain property which was purchased by the Defendants in 1866 at a Court sale held in execution of a decree passed against *Tahira*, one of the daughters of *Karimudin*. The grounds of the claim are, that the property in question is vakf, and that *Tahira* had only a life-interest therein. Two points, therefore, arise for consideration: first, whether the property is vakf, and, secondly, whether the estate of *Tahira* therein was only a life estate. The facts are these. In 1838, *Karimudin*, who was the owner of the property, executed what he called a vakafnama. In it he says: 'My private properties which are at this day under my management and in my enjoyment I have made a vakf of on my wives and on my aulad and other persons.' He then names his two wives and the two daughters of each (whom apparently he means whenever he speaks of his aulad), and he describes the property which he purports to settle as vakf upon them. He then dedicates a certain other part of his property, consisting of two nafars, expressly in vakf, for such purposes as the preparing of his own tomb, the saying of prayers, the holding of a fair, the recitation of the Koran, &c.; and he directs that his aforesaid two wives and their aulad and aflad (*i.e.*, his descendants generally), from generation to generation, shall deposit the produce of these two nafars with some honest man and make the necessary disbursements; that if this cannot be done they shall take their respective shares of the produce, and make the disbursements; that should the produce of the two nafars prove insufficient for the purpose, his wives and their aulad and aflad shall contribute from the property settled in vakf on them; and that should the produce of the two nafars be more than is sufficient, they should expend it in charitable purposes. He then lays down certain rules for the management and inheritance of the property he purports to settle in vakf on his wives and his aulad then living and on their descendants that may be born thereafter; viz., (1.) that if one of the aulad of either wife die, the share of that person shall go to the wife and the survivors of her aulad; that, after the death of a wife, her share shall go to her surviving aulad; that, if a wife and her aulad cease to exist, their share shall go to the other wife and her aulad; that, on the failure of aulad and aflad of

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both wives, the next of kin of the settlor shall receive the property, and he adds that in this manner it is provided that the management shall proceed 'from generation to generation;' (2.) that neither of the said two wives nor any one of the aulad of the wives shall alienate either by sale or gift or mortgage either their shares of the above-mentioned property or any field or bush or any part of the land. He then appoints himself the muttavalli of the property for his own lifetime and he appoints *Mahomed Abdula* and *Mahomed Husein* to be the muttavallis after his death until a male from amongst his aulad attains the age of discretion.

"In this way *Karimudin* assumed to make a settlement in vakf of his whole property. A part he did indeed settle in vakf, that is to say, he assigned it directly and expressly for certain religious purposes. That part is not in dispute now. The other part, a portion of which is in suit, he assigned under the denomination of vakf to himself and to his descendants with the evident intention that it should remain in the possession of his family inalienable, at any rate until, by failure of near descendants, it might fall into the hands of his next of kin, if indeed the provisions against alienation were not intended to apply to them also. The settlement, it is to be noted, has been already discussed by this Court in a case in which it was described as a document 'purporting to settle, with certain exceptions, moieties of the settlor's estate on his wives *Amina* and *Ayesha*, on the daughters of the former, *Fatesaheb Bibi* and *Masa Bibi*, and on the daughters of the latter, *Tahira* and *Sara Bibi*, and the descendants of these donees in each line, so long as it should subsist, with cross-remainders on the extinction of either line to the representatives of the other, and a final remainder on the extinction of both lines to the heirs of the settlor.' See *Phate Saheb Bibi* v. *Damodar Premji* (1). The effect of the settlement was not in issue in that case, though *West*, J., observes: 'Whether a vakf could indeed be created for the purpose merely of conferring a perpetual and an inalienable estate on a particular family, without any ultimate express limitation to the use of the poor or some other inextinguishable class

(1) Ind. L. R. 3 Bomb. 84.

of beneficiaries, appears to be a question of some nicety, as to one element at least of which the Mahomedan doctors have differed.'

"This, however, is the point that we have now to determine, viz., whether the settlement of the lands in question on the donor and his descendants is a valid vakf settlement when the deed does not provide for any ultimate devolution of the lands to any charitable or religious object. It is true that it does provide that, if the produce of the two nafars of land expressly assigned for a religious object falls short, the holders of the land in suit are to make up the deficiency out of the produce thereof; but we cannot hold this to be any appropriation of that land for that purpose, and it cannot, in our opinion, affect the decision of the general question as to the validity of the settlement irrespectively of any such direction. The first case to be noted on the subject is that of *Abdul Ganne Kasam* v. *Hussen Miya Rahimtula* (1), in which it was held that it is not sufficient to use in the deed the mere term vakf, but that, in order to constitute a valid vakf, there must be a dedication of the property solely to the worship of God or to religious or charitable purposes. To the same effect is the ruling in the case of *Mahamed Hamidullakhan* v. *Lotful Huq* (2). In *Fatmabibi* v. *Advocate General of Bombay* (3), it was held that the intermediate settlement of property on the founder's children and their descendants would not invalidate a settlement of that property as vakf if there was an ultimate dedication to a pious and unfailing purpose. In the same volume there is another case—*Sayad Mahomad Ali* v. *Sayad Gobar Ali* (4)—in which it was held that a settlement in which no religious purpose at all was expressed was no valid vakf settlement. In the case of *Luchmiput Sing* v. *Amir Alum* (5), a grant in vakf was held valid as being a complete endowment of property for religious and charitable purposes when coupled only with a direction that the manager should maintain the future male descendants of the donor. The latest case to which we have been referred is *Amrutlal Kalidas* v. *Shaik Hussein* (6),

(1) 10 Bomb. H. C. R. 7.
(2) Ind. L. R. 6 Calc. 744.
(3) Ind. L. R. 6 Bomb. 42.
(4) Ind. L. R. 6 Bomb. p. 88.
(5) Ind. L. R. 9 Calc. 176.
(6) Ind. L. R. 11 Bomb. 492.

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in which *Farran*, J., following the decision in *Fatmabibi* v. *Advocate General of Bombay* (1), held the grant to be valid, an ultimate charitable object having been clearly and expressly designated in the deed of grant. In the present case, however, there is no such condition expressed. The settlement is solely for the benefit of those descendants of the donor who may succeed to the property and those who may take it as next of kin. It is true that the logical deductions from the arguments of *Abu Yussuf*, referred to in *Amrutlal Kalidas* v. *Shaik Hussein* (2), would favour the opinion that a settlement would be valid as vakf even in such a case, since on failure of heirs 'the rent or produce would revert to the poor, which must be supposed to be the appropriator's design, though he should fail to mention it' (*Baillie's* Mahomedan Law, p. 553, as cited in *Amrutlal Kalidas* v. *Shaik Hussein* (3). We cannot, however, adopt such an opinion, which is opposed to the opinions both of *Hanifa* and *Mahammad* and has been more than once dissented from in our Courts. In *Fatmabibi* v. *Advocate General of Bombay* (4) *West*, J., said: 'Vakf must have a final object which cannot fail, and this object, it seems, must, according to the better opinion, be expressly set forth;" and again: "If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a vakf is not made invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take, may constitute a perpetuity in the sense of the English law, but according to the Mahomedan law that does not vitiate the settlement provided the ultimate charitable object be clearly designated' (5). And, in *Amrutlal Kalidas* v. *Shaik Hussein* (2), *Farran*, J., said: 'If I were at liberty to draw my own deduction from the sayings of *Hanifa* and the two disciples, and to decide in the light of modern jurisprudence, between the conflicting opinions of the latter, I should, without doubt, give the preference to the view of *Mahammad* and refuse to press the arguments of *Abu Yussuf* to their legitimate conclusion.' Though thus expressing his own views, Mr. Justice *Farran* felt himself at liberty

(1) Ind. L. R. 6 Bomb. 42.
(2) Ind. L. R. 11 Bomb. 492.
(3) Ind. L. R. 11 Bomb. 503.
(4) Ind. L. R. 6 Bomb. 51.
(5) Ind. L. R. 6 Bomb. 53.

to follow the decision of Mr. Justice *West* in *Fatmabibi* v. *Advocate General of Bombay* (1), which goes far beyond the decisions in the cases summarized at page 499 of the report in *Amrutlal's* case, as to which *Farran*, J., said: 'The conclusion which is properly deducible from the above-cited cases is, I think, that where the primary and general object of the endowment is for the furtherance of religious or charitable purposes, or for the worship of God, such endowment is valid, although the vakafnama may also provide for the support of the family and descendants of the founder; but that where the vakafnama has for its real object nothing connected with the worship of God or religious observances, and provides only in a very remote contingency for the poor, such remote provision does not validate a perpetuity for the benefit of the dedicator's children and their descendants so long as any such exist.' Having regard to the opinions expressed by *West* and *Farran*, JJ., in the cases of *Fatmabibi* and *Amrutlal*, we do not feel justified in extending the rulings in those cases to such a case as the present, where there is no express provision at all for the ultimate devolution of the property to any religious or charitable object. The grant in vakf cannot, therefore, be upheld.

"It was next argued that, independently of the vakf, the settlement is valid as a grant by *Karimudin* of his estate to his wives and their daughters for their lives, and that, in that view of the case, *Tahira* would have had only a life estate in the property in suit, which, on her death, would have reverted to *Karimudin's* next of kin. It was not, however, shewn to us how *Karimudin* could legally create such a life estate or grant the property to his next of kin on the determination of the life estates. In his lifetime he made no grant, for he kept the possession of the property with himself until his death, and on his death, his estate would devolve on his heirs by Mahomedan law, and as said in the case of *Ranee Khujooroonissa* v. *Mussamut Roushan Jehan* (2), the policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. The creation of any life estate at all appears quite inconsistent with the Mahomedan law. See *Mussamut Humeeda* v. *Mussamut Budlun* (3). It might

(1) Ind. L. R. 6 Bomb. 42. (2) Law Rep. 3 Ind. Ap. 291.
(3) 17 W. R. 525.

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be that by consent such an estate might be created, but as a general rule the donee in such a case would take an absolute estate. 'All our masters are agreed that when one has made a gift and stipulated for a condition that is fasid or invalid, the gift is valid and the condition void' (*Baillie's* Mahomedan Law, p. 537). So in the Hedeya, III., p. 309, it is said: 'An amri or life grant is nothing but a gift and a condition, and the condition is invalid; but a gift is not rendered null by involving an invalid condition.' We may also quote the case of *Chekkonekutti* v. *Ahmed* (1) as an authority against the validity of this settlement under which the next of kin claim that the property was given to them after the death of the wives and aulad and aflad of the donor. The settlement, therefore, must be rejected from the case altogether. It is not valid as a vakf, and it is not valid as a deed of gift to the next of kin. If valid at all, it would be so only as a gift to the donor's wives and daughters.

"In any case, therefore, it is not shewn that *Tahira* held a life-interest only in the property which was sold as hers and purchased by the Defendants. It follows that the Plaintiff's suit to eject the Defendants on the ground that *Tahira* had only a life interest must fail."

Mayne, for the Appellants, said that he could not contend that the deed of 1838 was valid as a wakfnama, even though there was some dedication to religious purposes. With regard to its secular objects, even as a deed of settlement it was not altogether invalid; but its real operation was as a will which became valid by the consent of all the heirs who had an interest in the estate. Reference was made to *Ranee Khujoorunnissa Begum* v. *Roushan Jehan* (2); *Umes Chunder Sircar* v. *Mussumat Zahoor Fatima* (3).

The Respondents did not appear.

1892
July 2.

The judgment of their Lordships was delivered by

LORD WATSON:—

The Appellants are Plaintiffs in this suit, which was brought in 1884 for possession of lands which had been taken in execu-

(1) Ind. L. R. 10 Mad. 196. (2) Law Rep. 3 Ind. Ap. 291.
(3) Law Rep. 17 Ind. Ap. 201.

tion and judicially sold in the year 1866, and were thereafter purchased by the father of the Defendants. The cause of action disclosed in the plaint was this—that *Tahirabibi*, the judgment debtor, held the lands under a wakfnama executed in January, 1838, by her father *Karimudin*, which limited her interest to a bare life-rent; that the decree of sale only carried the life estate of *Tahirabibi*, who died in November, 1873; that the Defendants' title to possess came to an end upon her death, and the lands reverted, in the first place, to her sister *Fatehsahebbibi* in life-rent, and on her decease to the Appellants as heirs of *Karimudin* and his daughter *Fatehsahebbibi*. The issue adjusted to try the only matter affecting the merits of the case, namely, the nature of the interest which the judgment debtor had in the lands sold for her debt, was thus expressed—"Is the wakfnama of 1838 valid according to the Mahomedan law?"

The second class Subordinate Judge of *Panvel* found for the Appellants, being of opinion that *Karimudin's* deed of 1838, although ineffectual to constitute a proper wakf, was nevertheless valid as a settlement, and also that *Tahirabibi* had a mere life estate. The Assistant Judge of *Thana* affirmed his decree for reasons substantially the same, recognising the efficacy of the deed as a settlement; but, on second appeal to the High Court of *Bombay*, both judgments were reversed, and the Appellants' claim rejected with costs. The learned Judges agreed with both Courts below that the deed was invalid as a wakfnama; but they held that it was also inoperative as a settlement, in respect that no possession had followed upon the lifetime of *Karimudin*.

The learned counsel who appeared for the Appellants, with great candour and propriety, admitted that after the recent decision of this Board in the case of *Sheik Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1), he could not successfully maintain the document of 1838 to be valid as a wakfnama. In that case Lord *Hobhouse* said that their Lordships "have not been referred to, nor can they find any authority shewing that, according to Mahomedan law, a gift is good as a wakfnama, unless there is a substantial dedication of the property to charitable uses at some period of time or other." In this case

(1) Law Rep. 17 Ind. Ap. 28.

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the so-called wakfnama makes no gift of the lands in question, either immediate or ultimate, for religious or charitable purposes. The document professes to create a wakf, but, in reality, the legal heirs of *Karimudin* are the only objects of his bounty. The lands are destined to his wives and children, and to the descendants of the latter in perpetuity, in the order and according to the shares prescribed by the Mahomedan law of succession, but subject to the limitation that none of them shall have the power of alienation by sale, gift, or mortgage.

Counsel also admitted that he could not successfully maintain that the document was a settlement, but he endeavoured to support the appeal on the ground that the deed styled a wakfnama ought to be treated as the will of *Karimudin*. He did not dispute that a Mahomedan cannot of himself, by a testamentary writing, either curtail or defeat the legal interests of his heirs; and that a Mahomedan will is therefore inoperative with regard to two-thirds of the testator's succession unless it is validated by the consent of the heirs having interest. Their Lordships do not think the Appellants would take any benefit from the document of 1838 if it were construed as the will of *Karimudin*. It was plainly not his intention to create a series of life-rents, a kind of estate which does not appear to be known to Mahomedan law (see *Humeeda and Others* v. *Budlun and the Government* (1)), but to make the fee devolve from one generation of his descendants to another without its being alienable by them, or liable to be taken in execution for their debts. Even if *Tahirabibi* had expressly consented to accept the will, she would not have been the owner of a life estate, but a full owner, with a prohibition against alienation, which, being void in law, could not affect either herself or her creditors. Although this point was taken in the High Court the Appellants were not in a position to press it. They have not averred in their pleadings that *Tahirabibi* gave such consent, and there is no evidence to shew that she did. Besides, there was no issue taken upon the point, and therefore no finding in fact upon which the High Court could proceed in a second appeal.

The judgment of the High Court appears to their Lordships

(1) 17 Suth. W. R. 525.

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to dispose in a satisfactory manner of all the arguments which have been addressed to them in the *ex parte* argument upon this appeal. They will humbly advise Her Majesty to affirm the judgment complained of and to dismiss the appeal.

Solicitors for Appellants: *Barrow & Rogers.*

GAJAPATI RADHIKA. . . . . PLAINTIFF;

AND

VASUDEVA SANTA SINGARO . . . . DEFENDANT.

J. C.*
1892
May 12, 13, 31.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Practice—Appellant not entitled to open a new Case.

Where Plaintiff's title to sue was treated in the Courts below as dependent upon the issue whether her deceased husband and the Defendant's deceased husband (sons of the same father) were sapindas of each other; and the Courts found that the Plaintiff's husband was illegitimate, and, therefore, not a sapinda of his brother, and on that ground dismissed the suit:—

Held, that assuming the Plaintiff to be entitled to avail herself of a finding by the High Court in another suit that the Defendant's husband was also illegitimate, she could not be allowed to raise in appeal the contention totally different from those which were heard and determined in the Courts below—viz., that two brothers can inherit from one another because they are equal in point of illegitimacy.

Sreemutty Dossee v. *Ranee Lalunmonee* (12 Moo. Ind. Ap. 470) followed.

APPEAL from a decree of the High Court (April 16, 1888), affirming a decree of the District Judge of *Ganjam* (Aug. 16, 1886).

The facts are stated in their Lordships' judgment.

The Appellant sued as widow of one brother to set aside an adoption by the widow of the other brother; the suit being based on the assumption of her right to succeed on the death of the adopting widow as reversionary heiress to that widow's husband. The first Court dismissed the suit, finding that the Appellant's

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husband was not legitimate, and therefore not a sapinda of the adopting widow's husband.

The High Court found that both brothers were illegitimate, and that even if they were legitimate the Appellant would not be reversionary heiress as claimed. The property in suit originally belonged to one *Padmanubha Deo*, the common ancestor of all parties, the right of succession to whose estate was adjudicated upon in *Sri Gajapathi Radhika* v. *Sri Gajapathi Nilamoni* (1).

Mayne, for the Appellant, said that he accepted all the findings of the Courts below except those relating to the adoption. On those undisputed findings the High Court ought to have held that the Appellant was a sapinda, and the only reversionary heir of *Krishna Chandra*. They are both illegitimate, and it is quite clear that they were always treated as being on perfect equality with each other. The basis of certain family compromises, which had been put in evidence, was that they were undivided brothers. As illegitimate sons they could not inherit from their father, but they could inherit from one another, according to the view of the law which the Appellant desired to propound. That is a question of pure law which it is competent to raise in appeal upon the facts as found, although it was not presented for the consideration and judgment of the Courts below.

Doyne, for the Respondent, was not heard.

1892
May 31.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The only question on which their Lordships have heard any argument is, whether the Appellant, who is the Plaintiff in the suit, shall be permitted to open a case which she did not bring before either the Court of First Instance or the Court of Appeal below. The material facts are as follows:—

Padmanabha, talookdar of *Tekkali*, had two sons by different women. The Plaintiff is the widow of one of them named

(1) 13 Moore's Ind. Ap. Ca. 497.

Gopinadha. The first Defendant *Radhamani* is the widow of *Krishna*, the other son, and the second Defendant is a boy whom *Radhamani* has purported to adopt. The Plaintiff alleges that the adoption is invalid, and that, as the widow of *Gopinadha*, she is the heir of *Krishna*, subject to his widow's interest. She has brought this suit to set aside the adoption. It is plain, therefore, that she cannot obtain a decree unless, setting aside the adoption, she would stand next to *Radhamani* in the line of succession to *Krishna*.

For the defence it is alleged that *Krishna* and *Gopinadha* were not sapindas to one another. *Krishna*, as the Defendant has pleaded, was the son of a Kshatriya woman married to *Padmanabha*, who was himself a Kshatriya, whereas *Gopinadha* was born to *Padmanabha* by a woman of some inferior caste.

On these pleadings issues were settled, the first being whether *Gopinadha* was a sapinda of *Krishna*. The District Judge found that *Gopinadha* was of illegitimate birth, and therefore was not a sapinda, and on that ground he dismissed the suit. He did not come to any finding on the other issues in the suit; but he intimated an opinion adverse to the Plaintiff on the question whether she could claim to succeed to the collaterals of her husband.

The Plaintiff appealed to the High Court, insisting on the legitimacy of her husband; but the High Court agreed with the District Judge on this point. They also expressed an opinion that, by the law prevalent in *Madras*, a widow is not in the line of succession to her husband's male collaterals. The appeal, therefore, was dismissed.

Connected with this suit, both in the original Court and in the High Court, was another suit to set aside the adoption, brought by one *Brundavana*, an illegitimate son of *Krishna*, claiming to be his heir according to the law applicable to the Sudra caste. The Plaintiff was no party to this suit, but the Defendants were the same as in her suit. The two were tried simultaneously, and the evidence in one was admitted in the other.

In *Brundavana's* suit the District Judge found that *Krishna* was not a Sudra, and that an illegitimate son could not succeed

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to him, and on appeal the High Court took the same view. That view of course was fatal to the suit, which was dismissed. The High Court also expressed an opinion that *Krishna* was an illegitimate son of *Padmanabha*—a point which does not appear to have been put directly in issue, but which was discussed as incidental to the question of caste, and was treated by the District Judge as of no moment and not requiring a decision. They further held that the adoption was lawful and valid.

As the Plaintiff's case has been opened on this appeal, she now takes the ground that if, as has been conclusively decided, her husband was illegitimate, so also it has been held by the High Court that *Krishna* was illegitimate, and her counsel contend that the two illegitimate sons, neither of whom could inherit from their father, can yet inherit from one another.

Their Lordships will assume for the present purpose that the Plaintiff is entitled to avail herself of the finding of the High Court in *Brundavana's* suit, to establish the illegitimacy of *Krishna*. And of the legal inference which is put forward, as they have not heard the argument for it, they will only say that it does not command assent at first sight. But they do not further examine it, because they think the appeal cannot be maintained on a ground so inconsistent with all the previous proceedings in the case.

In both the Courts below, and indeed up to the moment when her case was lodged in this appeal, the Plaintiff has been insisting on the legitimacy of her husband and his brother. It may be conceded that she might originally have framed her case in the alternative, so as to claim heirship if the disputed issue of legitimacy was decided against her. Then the case would have been tried with reference to that contention, and all facts ascertained, and researches into the law conducted accordingly. Possibly she might, on application to the High Court, have obtained some indulgence enabling her to amend the record and try the question. Mr. *Mayne* has urged that the question he submits is one of pure law, which he says this Committee may decide upon the facts found by the Courts below. No doubt there are cases in which the Court of Appeal will entertain questions of law not argued below, but which are raised by the facts stated in the

pleadings. It is impossible to lay down any precise rule for such cases. But Mr. *Mayne* could not, after time for search, find any case in which this Committee had allowed a Plaintiff to rest his appeal upon a legal theory never presented to the Courts below, and rested on a state of facts inconsistent with the facts on which he had previously rested his case. In the judgment of this Committee in *Sreemutty Dossee* v. *Ranee Lalunmonee* (1), it is said: "Their Lordships cannot but feel that it would be most mischievous to permit parties who had had their case upon one view of it fairly tried, to come before this Board and to seek to have the appeal determined upon grounds which have never been considered, or taken, or tried in the Court below. It is obvious that if they wished to make the case which they now make they would, by their answer, have put the case in the alternative."

Indeed in cases of this kind, which may involve subtle and difficult questions of personal status, it is not easy to say what matters of fact would have to be ascertained for the proper decision of each proposition of law. One may be specified. There is no issue and no finding by either Court as to *Gopinadha's* caste. And yet it is impossible to suppose that the question whether two brothers can inherit from one another because they are equal in point of illegitimacy could be properly tried without knowing how they stand relatively in point of caste. It is indeed clear that to lay down a rule of inheritance between rival claimants, without a trial of the case in view of that rule, may involve serious risk of miscarriage.

But even viewing the question as one of abstract law, the rule now propounded is of a very peculiar kind, so unfamiliar as not to have occurred to the Plaintiff's advisers in *India*, though they must have been quite awake to the possibility that both brothers might be found illegitimate. It is part of a law of inheritance confined to Hindoos—perhaps, if we may judge by the utterances of the Courts below, confined to *Madras*, and certainly varying with the caste of the persons concerned. It is not right that Her Majesty in Council should be asked to decide such a point without any assistance from the Courts in *India*.

(1) 12 Moo. Ind. Ap. 470.

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It is clear to their Lordships that this new contention cannot properly be heard by them on this appeal; and considering the length of this litigation, and the fact that another appeal is awaiting the result of this one, it would be wrong to give the Plaintiff any indulgence by way of amending the record.

They will humbly advise Her Majesty to dismiss the appeal, and the Appellant must pay the costs.

Solicitor for Appellant: *R. T. Tasker.*

Solicitors for Respondent: *Pemberton & Garth.*

J. C.*
1890
Jan. 29, 30, 31;
1892
July 23.

SRI GAJAPATI RADHAMANI GARU . . DEFENDANT;

AND

MAHARANI SRI PUSAPATI ALAKARA-JESWARI . . . . . PLAINTIFF.

AND THE REVIVED APPEAL.

ON APPEAL FROM THE HIGH COURT IN MADRAS.

Hindu Law—Co-Widows—Widow's Power of Alienation—Absence of co-Widow's Consent.

A mortgage by a Hindu widow even for necessary purposes without the concurrence of her co-widow is not binding upon the joint estate which has descended from their deceased husband so as to affect the interest of the co-widow.

Quære, whether a case for borrowing without the co-widow's consent could be established so as to empower one widow so to bind the estate; certainly it cannot where the concurrence of the co-widow was not even applied for. In this case the mortgage on its true construction did not purport to bind the whole estate.

APPEAL from a decree of the High Court (Dec. 2, 1884), reversing a decree of the District Judge of *Ganjam* (Nov. 5, 1883).

The facts are stated in the judgment of their Lordships.

Doyne, for the Appellant, contended that the Respondent had no right to hold the lands comprised in the mortgage liable for

* *Present on the hearing of the Appeal:*—LORD WATSON, SIR BARNES PEACOCK, and SIR RICHARD COUCH. *Present on the delivery of the Judgment:*—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

the mortgage debt after the death of the mortgagor. The mortgagor had no power to convey beyond the extent of her own interest; and on the true construction of the mortgage she only intended to bind her own widow's estate. She had no power to transfer the Appellant's interest or to render her personally liable for the amount borrowed. She could not bind her co-widow either by the general law or on the ground of justifying necessity. No necessity for borrowing had been proved; and still less was there any necessity for mortgaging without the co-widow's consent. The Respondent had not shewn that she had made such inquiries as she was legally bound to make before advancing her money. Further than that, she had neglected to take during the life of the mortgagor such steps as she was authorized by the mortgage bonds to take for recovering her advances or the interest thereon from the usufruct of the mortgaged lands. Reference was made to *Hunoomanpersaud Panday* v. *Munraj Koonweree* (1); *Sri Gajapathi Nilamani* v. *Sri Gajapathi Radhamoni* (2); *Sri Gajapathi Radhika* v. *Sri Gajapathi Nilamoni* (3).

Mayne, for the Respondent, contended that the incumbrances created by *Nilamani*, the mortgagor, were a valid charge upon the estate. There were concurrent findings of fact as to the necessity for raising the loans; and beyond that the representations made to the Respondent and the result of the inquiries made by her justified her advancing the moneys and entitled her to recover them. With regard to the contention that she never intended to do more than bind her own limited interest, that point was not taken in the Courts below or in the pleadings. The principle of Hindu law is that in a case of necessity one parcener can bind another, and a widow can bind her husband's reversionary heirs; so also it is a principle of the same law that in case of necessity a widow can bind her co-widow as regards the estate in which they are both interested: see Mitak. c. 1, sec. 1, v. 27. When the act is done for the benefit of all interested, their express consent is not required.

(1) 6 Moore's Ind. Ap. Ca. 393.
(2) Law Rep. 4 Ind. Ap. 212, 221.
(3) 13 Moore's Ind. Ap. Ca. 497, 517.

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Reference was made to 2 *Strange's* Hindu Law, pp. 339, 340; *Bissumbhur Naik* v. *Sudasheep Mohapatter* (1); *Juggemath Khootia* v. *Doobo Misser* (2); *Ponappa Pillai* v. *Pappuvayyangar* (3). As to the respective rights of the two widows in their husband's estate, see *Sri Gajapaty Hari Krishna* v. *Sri Gajapathi Radhika* (4); *Sri Gajapathi Radhika* v. *Sri Gajapathi Nilamoni* (5); *Bhagwandeen Doobey* v. *Myna Bace* (6); *Tanjore Case* (7); *Babaji Mahadaji* v. *Krishnaji Deoji* (8).

Doyne, was not heard in reply.

1892
July 23.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

This is an appeal from a judgment and decree of the High Court of Judicature at *Madras*, in a suit in which the deceased predecessor in estate of the Respondent was the Plaintiff, and *Radhamani*, who is now dead, was the Defendant.

The suit was brought in the District Court of *Ganjam* to recover Rs.77,706 4*a*. interest and principal, due upon two mortgage bonds, one dated the 30th of March, 1874, for Rs.35,000, repayable on the 23rd of April, 1880, the other dated the 3rd of July, 1874, repayable on the 6th of July, 1881.

Both these mortgage deeds were executed by *Neelamani Patta Maha Devi*, and both contain a possessory mortgage of the *Talagam* khandam in the *Tekkali* estate.

Neelamani died on the 1st of October, 1882, and the Plaintiff sought to recover the debts from the mortgaged property in the hands of her surviving co-widow, *Radhamani*, and from her other property.

Radhamani answered that the alienation, having been made without her consent, was invalid; and, further, that there was no necessity for the loans so as to bind the estate beyond the lifetime of *Neelamani*.

The following issues were laid down :—

I. Could *Neelamani* (deceased) under any circumstances

(1) 1 Suth. W. R. 96.
(2) 14 Suth. W. R. 80.
(3) Ind. L. R. 4 Mad. 18.
(4) 2 Madras, H. C. R. 369.
(5) 13 Moore's Ind. Ap. Ca. 497.
(6) 11 Moore's Ind. Ap. Ca. 487.
(7) 3 Madras, H. C. R. 424.
(8) Ind. L. R. 2 Bomb. 666.

create a valid charge on the property binding on the estate in the hands of the survivor, a co-widow?

II. If so, was there any necessity in the present case to contract the loan so as to bind the estate?

The first mortgage was as follows:—

"Deed of mortgage with possession, dated Monday, the 18th day of Chaitra Suddha, of the year Bhava, corresponding to the 30th of March, 1874, executed and given by *Sri Sri Sri Gajapati Neelamanai Patta Maha Devi Garu*, widow *Sri Gajapati Khrishna Chandra Devu Raja Garu*, of Kshatriya caste, zamindarni, residing in *Raghunathapuram*, in *Tekkali* taluq, in *Ganjam* district, to *Sri Kakarlapudi Neelayyamma Garu*, widow of *Sri Kakarlapudi Bangaru Razu Garu*, mokhasadar of Kshatria caste, residing in *Pandranki*, within the jurisdiction of the Registrar of *Bimlipatam*, in *Vizagapatam* district.

"The amount received from you this day as a loan for the purpose of paying up the arrears of peshkush due by me to Government for the khandams of *Talagam*, *Nandigam*, and *Nowgam* comprised in my zamindary, and for the purpose of discharging the debts contracted by me from *Abburu Surya Narayana Pantulu Garu*, on the mortgage of *Talagam* khandam for the aforesaid purpose, is Rs.35,000.

"It is agreed as follows:—

"As I have received thirty-five thousand rupees, I will pay interest hereon at ten annas per cent. per mensem. I have mortgaged to you and put in your possession *Talagam* and other villages specified in the schedule hereunto annexed, situated in the khandam of *Talagam* in the taluq of *Tekkali*, within the jurisdiction of the Sub-Registrar of *Tekkali*, in the Registration District of *Ganjam*, included in my half share of *Tekkali* taluq, yielding an income of Rs.16,154 per annum by *Zeraiti*, *Shrotriam*, &c., assessed with peshkush of Rs.9817, being my husband's share of the taluq which came into my possession according to the judgment of the Privy Council, and which has been in my possession and enjoyment. You shall grant leases from Fasli 1284, till this bond is discharged, to renters arranged by me either for the amount mentioned in the schedule or for a higher amount, and you shall receive

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muchalikas (counterparts of lease deeds) from them. The money collected by your officer from them (renters) at the several instalments of each year shall be placed in a box in my cutcherry (office) room, under lock and key of your officer and my officer; and I myself will provide for the safety of the same. I myself will be answerable for any harm that may befall by act of State or act of God. Out of the money realized, I will receive Rs.150 a month for my expenses, and grant receipts therefor to your officer. You yourself shall pay, on my behalf, at the several instalments, the peshkush due to Government each year on the said khandam of *Talagam*, take receipts in my name, and hand them over to me. Out of the balance you shall take Rs.2625, the annual interest due to you from this date to the 13th Chaitra Suddha (April) of each year, and Rs. (360) three hundred and sixty a year for expenses of your establishment, in all Rs.2985, and pay over the surplus to me, and take receipts. The public expenses incurred for civil and summary suits which you may conduct for the recovery of money not paid by renters according to the several instalments shall be met from the balance on hand. The money again collected shall be added to the balance on hand. If the property mortgaged is not sufficient to meet the aforesaid peshkush and other expenses, the same shall be made good out of my other property. As you do not grant leases to those whom you like, but only to those who are appointed by me, I myself will be answerable for any profit or loss that may result.

"If the principal of Rs.35,000, and the interest accrued up to date, is paid in a lump on the 13th Chaitra Suddha of the year Pramadi (April, 1879), the date fixed for the repayment hereof, or in default of payment on that date, at some time between that date and the 13th Chaitra Suddha of the year Vikrama (April 23rd, 1880), the said mortgaged villages shall at once be put in my possession and this document returned to me. In default of payment in the said manner, I will pay the principal with interest at a higher rate, to wit, at 12 annas *per cent. per mensem* from the date of the bond. If any disputes arise with regard to any lands in the villages, &c., under mortgage, in connection with boundaries or other rights, I myself will look

after them, but you shall have nothing to do with the same. This is the deed of mortgage with possession executed and given with my consent."

The second mortgage was similar to the first in all points essential to the decision of the case. The District Judge dismissed the suit with costs.

As to the first issue, he held that *Neelamani* had no power to bind the interest of *Radhamani* without her consent, and that the mortgage did not in law bind the estate beyond the life of *Neelamani*, and further, he thought that the parties to the mortgage did not believe that *Neelamani* was charging or intended to charge any interest of *Radhamani*.

He stated that his finding on the first issue was sufficient to dispose of the case, and that he based his judgment upon it. He, however, proceeded to try the second issue, and with reference to his finding upon that issue it may be as well to call attention to the fact that the Rs.35,000 secured by the first mortgage was not merely for the payment of revenue, but also for the payment of debts contracted by *Neelamani*.

The District Judge held that *Radhamani* was not liable for those debts, and that there was no necessity, therefore, so far as she was concerned, to charge her interest in the estate for the amount borrowed to pay the debts. He said: "There was a real necessity, and the estate benefited to the extent of the money paid in discharge of the peshkush; but the transaction viewed as a whole was not, in my opinion, *bonâ fide*. Better terms might have been made for extinguishing the debt, and the sum advanced was excessive. The most that could be charged to the estate would be the principal sums paid for peshkush, and even then some deduction should be made on account of the profits which ought properly to have gone towards the extinction of the principal, and this I should have some difficulty in determining without taking an account of the actual profits of the khandam for the six years."

The High Court upon appeal reversed the judgment and decree of the District Judge, and gave a decree against the Defendant for the amount found due upon the mortgages. As to *Radhamani's* consent not having been obtained, they said it

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would have been impossible for *Neelamani* to have obtained *Radhamani's* assent to any arrangement which she might have proposed at a time when they were in litigation, and that the moneys borrowed were for *Radhamani's* benefit, and that she was bound by the mortgages.

It by no means follows that if it had been necessary to borrow money to save the estate of the two widows from sale for arrears of revenue, *Radhamani* would have refused to consent to mortgage the joint interest of the widows for a sum sufficient to discharge those arrears, notwithstanding the widows were at enmity, and actually engaged in litigation with each other respecting the estate.

At any rate an application was not made to *Radhamani* for her consent, and without such an application it is impossible to hold, even if that would be sufficient, that *Neelamani* was under such a necessity of borrowing money without *Radhamani's* consent for the preservation of the estate that a mortgage by *Neelamani* alone would be binding upon *Radhamani's* interest in the event of her survival.

But there was a very good reason why *Neelamani* did not apply to *Radhamani* for her consent. The mortgages were in 1874, whereas it appears that down to the year 1877 *Neelamani* was contending that *Radhamani* as junior widow took no interest in the estate, but was merely entitled to maintenance: *Gajapati Nilamani* v. *Gajapati Radhamani* (1). It was not determined until 1877 that *Radhamani* had a joint interest in the estate. If *Neelamani* had applied to *Radhamani* to join in the mortgages she would have impliedly admitted that *Radhamani* had a joint interest.

It may be assumed for the present judgment, without deciding the point, that there was a sufficient necessity for borrowing money to pay the Government revenue, or even for the payment of *Neelamani's* debt; but that necessity did not render a mortgage by one widow binding upon the joint estate which had descended from their deceased husband so as to affect the interest of the surviving widow: *Bhugwandeen Doobey* v. *Myna Baee* (2). But, irrespectively of these considerations, it appears clear to their

(1) Law Rep. 4 Ind. Ap. 212. (2) 11 Moore's Ind. Ap. Ca. 515, 516.

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Lordships that the mortgages were not so framed as to bind the estate in the hands of *Radhamani*, as the surviving widow after the death of *Neelamani*. Many of the stipulations in the mortgages were personal to *Neelamani*, and they cannot be held to have been binding or intended to be binding upon *Radhamani* or her interest in the event of her surviving.

Their Lordships are, therefore, of opinion that the mortgages were not binding upon *Radhamani*, and that the decree of the High Court ought to be reversed, with costs in that Court, and the decree of the District Judge affirmed.

They will humbly advise Her Majesty accordingly.

The Respondent must pay the costs of this appeal.

Solicitors for Appellant: *Pemberton & Garth.*

Solicitor for Respondent: *R. T. Tasker.*

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June 29.

NAWAB KHAJA AHSANULLA KHAN BAHADOOR . . . . . DEFENDANT;

AND

HURRI CHURN MOZOOMDAR . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF BENGAL.

Regulation VIII. of 1819, *s.* 8, *cls.* 2 *&* 3—*Defective Notice of Sale—Sale for Arrears of Rent set aside.*

It is a condition precedent to a valid sale under Regulation VIII. of 1819 for six months' arrears of rent that the notice of sale should follow strictly the terms of clause 3 of sect. 8, and so intimate to the debtor not merely the balance due but that payment of three-fourths thereof will prevent a sale. If the notice follows instead the terms of clause 2, and intimate that the whole arrear must be paid, it is essentially defective, and the sale must be set aside.

Although the objection was not taken in the lower Court, yet appearing on the face of the notice, and being fatal to the proceeding, it was competently taken in appeal before the High Court.

Olpherts and Macnaghten v. *Mahabir Pershad Singh and Another* (Law Rep. 10 Ind. Ap. 25) distinguished.

APPEAL from a decree of the High Court (Jan. 31, 1890), affirming a decree of the Subordinate Judge of *Mymensing* (April 28, 1888).

* *Present*:—LORD WATSON, LORD HOBHOUSE, SIR RICHARD COUCH, and LORD SHAND.

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The facts are stated in the judgment of their Lordships.

Branson, for the Appellant, contended that the High Court was in error in holding that the notice served and published by the Appellant was not such a notice as was required by clause 3 of sect. 8 of Regulation VIII. of 1819. The form of the notice was not shewn to have prejudiced the Respondent or his interests in any way, and it was submitted to have been in substantial compliance with the requirements of the regulation. No objection was taken thereto until the case was being argued in appeal, and it was too late for the Respondent then to put it forward or to rely on it. Yet the High Court, which in its judgment dissented entirely from that of the Subordinate Judge, and reversed all his findings of fact, nevertheless affirmed his decree on the ground of the defective character of this notice, which had not been objected to before him. Reference was made to *Olpherts* v. *Mahabir Pershad Singh* (1). [*Cowie*, Q.C., referred to *Maharajah of Burdwan* v. *Tarasoondari Debia* (2), and to *Maharani of Burdwan* v. *Murtunjoy Singh* (3).] See *Sreemutty Dossee* v. *Pitambar Panda* (4).

Cowie, Q.C., *C. W. Arathoon*, and *Rattigan*, for the Respondent, were not called on.

The judgment of their Lordships was delivered by

LORD SHAND:—

Their Lordships do not think it necessary to call for any reply in this case. A zemindar having an interest in a talook of this kind has undoubtedly, under the provisions of Regulation VIII. of 1819, a power of sale in the case of default in payment of the rent; but that power of sale, which is given as a very summary remedy, and which may be exercised immediately on arrears arising, is given under important conditions, the fulfilment of which is of the utmost consequence, not only to the person having a right to the talook, but to all those who have rights

(1) Law Rep. 10 Ind. Ap. 25.
(2) Law Rep. 10 Ind. Ap. 19.
(3) Law Rep. 14 Ind. Ap. 30.
(4) 24 Suth. W. R. 129.

under him; not only to the putnidars, but to the sub-lessees, mortgagees, and other incumbrancers, whose rights may be affected or extinguished by the sale taking place.

The regulation provides for two separate cases. It provides under clause 2 of sect. 8 for the case of an arrear which has extended to twelve months; and under clause 3 of the same section it provides for a still shorter arrear, namely, non-payment of the rent due at the end of six months. In the case of arrear occurring, the regulation provides for specific notice to be given of the intention to proceed to sale. Clause 2 of the section is as follows: "On the first day of Bysakh, that is, at the commencement of the following year from that of which the rent is due, the zemindar shall present a petition to the Civil Court of the district, and a similar one to the collector, containing a specification of any balances that may be due to him on account of the expired year from all or any talookdars, or other holders of an interest of the nature described in the preceding clause of this section. The same shall then be stuck up in some conspicuous part of the kucheree, with a notice that if the amount claimed be not paid before the first of Jyte following, the tenures of the defaulters will on that day be sold by public sale in liquidation."

The notice in that case ought to state, in terms of the clause, that if the full amount due, and specified in the notice, be not paid before the date therein mentioned, the tenure of the defaulter will be sold by public sale. In order to have that notice in proper form it must contain, not merely a specification of the arrears, but a notification that the sale will proceed unless payment of the rent be made within the time limited.

In the case now before their Lordships of six months' arrears of rent only having become due, the provision applicable is in these terms: "On the first day of Kartick in the middle of the year, the zemindar shall be at liberty to present a similar petition, with a statement of any balances that may be due on account of the rent of the current year up to the end of the month of Asin, and to cause similar publication to be made of a sale of the tenures of defaulters, to take place on the first of Aughun, unless the whole of the advertised balance shall be

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paid before the date in question, or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartick to less than one-fourth, or a four-anna proportion of the total demand of the zemindar, according to the kistbundee, calculated from the commencement of the year to the last day of Kartick."

It appears to their Lordships to be clear that the notice, which is a condition precedent to any sale taking place under this clause, must in all material respects comply with the provisions of the clause, and that therefore there should be intimation made to the debtor, in terms of the clause, not only of the balance due, but an intimation that unless the whole of the advertised balance shall be paid before the date in question, or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartick to less than a fourth of the total demand of the zemindar, the sale will take place.

But it is conceded in this case that the notice, instead of being framed as clause 3 required, and so containing an intimation that payment of three-fourths of the arrear would prevent a sale, contained a distinct statement that, unless the whole of the arrears were paid, the sale would take place. In short, the notice followed the terms of clause 2, whereas the case was one under clause 3; and it not only failed to give the intimation of the proportion of the arrear which if paid would prevent a sale, but gave an erroneous and misleading intimation, at least by implication, that payment of the whole arrear was necessary to prevent this.

The following passage in the judgment of the High Court appears to their Lordships to present the correct view of the law: "The object of the publication of this notice, is to give not only to the defaulting putnidars, but dur-putnidars, mortgagees, and other encumbrancers, notice of the sale. It may well be, that the putnidar, dur-putnidar, mortgagees, or other encumbrancers would have available, for the purpose of saving the estate from sale, 75 per cent. of the arrears due, but not the whole. We are of opinion that if the zemindar chooses to bring into operation the provisions of clause 3, sect. 8, and to get a half-year's rent by means of this regulation, he must strictly

comply with the conditions laid down in the section. We think that all the requirements in clause 2 of sect. 8 must be imported into clause 3 of that section *mutatis mutandis*, and therefore we think that the serving of the notice is a condition precedent to the sale being held, and that the notice so served must be a good notice; that is to say, it must be a notice which shall put all parties concerned in saving the tenure from sale in possession of the knowledge of what really they will have to do if they desire to save the tenure, and would-be purchasers in possession of information as to the amount they will have to spend if they wish to purchase the property." Their Lordships adopt this expression of opinion; in this case the notice was essentially defective, and the sale was consequently bad, and must be set aside.

It has been contended on the part of the Appellant that this objection came too late. No doubt the objection was one which ought to have been taken before the Court of first instance; but their Lordships are not prepared to hold that an objection of this kind, fatal to the whole proceedings, and appearing upon the face of the notice itself, was not competently raised before the High Court, and entertained by them.

The case of *Olpherts and Macnaghten* v. *Mahabir Pershad Singh and Another* (1), to which their Lordships have been referred, is of a totally different character. In that case a question was raised for the first time before the High Court, which would have necessitated inquiry as to whether there had been pecuniary injury to the party complaining of the alleged irregularity in the proceedings which resulted in a sale, and that inquiry ought to have been made, if the point was to be maintained, in the Court of the Subordinate Judge. In this case the objection, which is at the foot of the whole proceedings, arises upon the notice which the zemindar himself gave, and no inquiry of any kind is necessary; and their Lordships are of opinion that it was not too late to take such an objection before the High Court, and that the High Court properly disposed of it. It was, indeed, maintained that the objection in this case did raise matter for inquiry, because it was said that it could be proved that the

(1) Law Rep. 10 Ind. Ap. 25.

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NAWAB KHAJA AHSANULLA KHAN BAHADOOR v. HURRI CHURN MOZOOMDAR.

form of notice given in this case had been generally in use for a number of years, even in case of a six months' arrear only. But the Court could not allow any such inquiry, because no extent of general use of such a form of notice could enable parties to dispense with a material and essential part of it.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss the appeal. The Appellant will pay the costs of the appeal.

Solicitors for Appellant: *Pemberton & Garth.*
Solicitors for Respondent: *T. L. Wilson & Co.*

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1892
March 11, 17, 18.
May 14.

LALA AMARNATH SAH AND OTHERS . . PLAINTIFFS;

AND

RANI ACHAN KUAR AND ANOTHER . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu Widow—Mortgage—Legal Necessity—Mortgagee's Burden of Proof—Proof of Knowledge as to effect of Deed.

To prove the validity of a mortgage by a Hindu widow of her husband's estate the burden of proof is on the mortgagee, to shew either that there was a legal necessity therefor, or, at least that, in advancing his money he gave credit on reasonable grounds to representations that the money was wanted for such necessity.

Hunooman Persaud Panday v. *Munraj Koonweree* (6 Moore's Ind. Ap. Ca. 393) followed.

Where as against the daughter, who had joined in the said mortgage, a subsequent deed of ratification was relied upon, *held*, that there being no evidence that in signing such deed she understood that she was subjecting her expectant estate to a burden which she was gratuitously undertaking, she was not bound thereby.

APPEAL from a decree of the High Court (Aug. 11, 1888) reversing a decree of the Sub-Judge of *Bareilly* (May 27, 1885).

The facts are stated in the judgment of their Lordships.

Doyne, and *Ross*, for the Appellants, contended that the High Court was wrong in holding that the loan taken from the Appel-

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

lants' predecessor by *Hulas Kuar*, was not taken for necessary purposes within the meaning of Hindu law; that *Achan Kuar* did not ratify the mortgage sued upon when she executed the power of attorney of the 5th of March, 1877; and that *Enayet Singh* was not bound by the same ratification, because he was at the date thereof a minor.

Mayne, for the Respondents, contended that the mortgage only bound the estate of *Hulas Kuar* for her life; and that there was no ratification by either *Achan Kuar* or *Enayet Singh*.

He referred to *Collector of Masulipatam* v. *Cavaly Vencatah Narrainapah* (1).

Doyne, replied.

1892
May 14.

The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

The Plaintiffs, who are now Appellants, brought a suit against the present Respondents and two other Defendants to enforce a mortgage bond executed to one *Moti Ram*, the ancestor of the Plaintiffs, for the purpose of securing an advance of Rs.32,000, with interest thereon.

The bond sued upon is dated the 23rd of March, 1873, and it commences in this way :—

" I, Raja *Lalji*, for self, and as guardian of *Kuar Enayet Singh* and *Kuar Shamshere Bahadur*, mukhtar of Rani *Hulas Kuar* wife, and manager of Rani *Achan Kuar* daughter, of Raja *Khyrati Lal*, caste Kayesth, resident of *Lucknow*, now residing at *Bareilly*, do declare that I have, under the power given to me by registered general power of attorney, dated 4th April, 1866, executed by Rani *Hulas Kuar* under the power of the certificate of guardianship, dated 18th July, 1866, and under the power which I have to make management in general, borrowed Rs.32,000 of the Company's coin, half of which is Rs.16,000, for the payment of the debt taken to meet the marriage expenses of *Kuar Enayet Singh* and the expenses of the case pending at *Lucknow* from before."

(1) 8 Moore's Ind. Ap. Ca. 550.

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LALA AMARNATH SAH v. RANI ACHAN KUAR.

Raja *Lalji* then agrees to pay the money in five years, and hypothecates and pledges certain mouzas belonging to Rani *Hulas Kuar.*

Khyrati Lal, who died in 1866, was the zemindar of the mouzas in question, and was also a dealer in money and in hundis. *Hulas* was his widow and heir. *Achan* was his only child, and she married Raja *Lalji. Enayet* and *Shamshere* were the children of that marriage, both being minors at the date of the bond. Very shortly after *Khyrati's* death, *Hulas* executed a mukhtarnama giving to *Lalji* very large powers of management and disposition over her property. She died on the 22nd of June, 1878. *Shamshere* and *Lalji* were the two Defendants below who are not now Respondents. They are both dead.

The plaint, which was filed in February, 1885, states that the four Defendants borrowed the money, and that *Hulas* hypothecated the estate; and it prays such relief as is usual in the case of mortgage bonds. *Lalji* did not put in any written defence; indeed, he cannot have had any defence. The other three Defendants all set up the defence (among others), that *Hulas* had only a widow's estate, and was under no necessity to borrow money. The Plaintiffs replied by a written statement in which they alleged that on the 5th of March, 1877, another deed was executed by *Hulas, Achan,* and *Enayet,* to *Lalji,* by which they admitted and recognised the deed of the 23rd of March, 1873. But the reply is quite silent, as was the plaint, upon the point whether the loan was necessary or not.

When the issues were settled, this point was treated as belonging to the defence, and was raised in the form of a question, how far the objections resting on the absence of necessity were tenable. It is obvious that such a mode of raising the question is incorrect, because it appears to assume that it was for the Defendants to shew absence of necessity; whereas the rule is that a mortgagee claiming title under a Hindu widow as against her husband's heirs should prove the validity of his mortgage; and this case presents no ground of exception to the rule. Neither party adduced any evidence bearing on the point.

The Sub-Judge gave the Plaintiffs a decree for an amount

something less than the amount claimed by them; and ordered that the hypothecation should be enforced. He was of opinion that the plea of non-necessity was not made out, apparently on the ground of the recital in the mortgage bond; and he also thought that the Defendants *Achan* and *Enayet* had confirmed the bond.

The Defendants, other than *Lalji*, appealed to the High Court. During the argument for the Plaintiffs, certain observations were made by their counsel which induced the Court to make an order enabling them to produce further evidence. The order is not in the record; but probably it was framed so as to allow the Plaintiffs to prove the necessity for the loan raised by *Hulas*. For that purpose, the Plaintiffs called as a witness one *Hira Lal*, who entered *Khyrati's* service in the year 1864, and managed, or assisted in managing, the monetary business up to the year 1880. He was the only witness called. *Lalji*, who must have known the facts better than anybody else, died shortly before the hearing of the appeal.

After hearing the further evidence, the High Court decided that there was no proof of any necessity for the loan, and that no act had been done by *Achan* or *Enayet* which had the effect of making them liable for it. They therefore dismissed the suit with costs. From this decree the Plaintiffs appeal, and it has been strongly urged at the Bar that they are entitled to succeed, both on the ground of the propriety and validity of the mortgage by *Hulas*, and on the ground that *Achan* and *Enayet* have validated it if originally invalid.

As regards *Enayet*, he has never had any present interest in the estate. He is only heir-apparent now; and on the 5th of March, 1877, the date of the deed relied on for the validation of the mortgage, he was not even so much as that; his mother *Achan* was then heir-apparent. It is not contended that he ever took upon himself any personal responsibility for the loan, and it is clear that he has never been in a position to confirm the mortgage.

As regards *Achan*, the expressions relied on in the deed are as follows. After stating that the former power of attorney was given to *Lalji* by *Hulas* alone, the three parties, *Hulas*, *Achan*,

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and *Enayet*, appointed *Lalji* their general attorney. They then proceed:—

"We covenant and record that whatever proceeding has been or may be taken by the said mukhtar on our behalf, *i.e.*, if he, having borrowed money, executes bonds or sells, pledges, mortgages, or alienates in some other way the moveable and immoveable properties, or gives in lease the whole or a portion of the villages at any jama he thinks proper, or gets the documents executed by us registered, or causes mutation of names to be effected in respect of villages, &c., owing to temporary or permanent alienations, all such proceedings taken by the said mukhtar shall be accepted and recognised by us as done by ourselves, and not ignored by us in any way."

The whole of these expressions except the three words "has been or," point to that which is the proper object of a power of attorney, viz., to give authority to the future acts of the attorney. *Achan* was a Purdanashin lady; she had no interest in the estate other than one in expectancy; she was not dealing with a stranger but with her own husband; she was not receiving any valuable consideration. It is true that she executed the deed after having it read over to her. But there is no evidence that she was told that amongst the somewhat profuse heap of words conferring ordinary powers on a general attorney, there lurked just three words having a far different effect, the effect, namely, of subjecting her expectant estate to a burden which she was gratuitously undertaking. There is no evidence that at this time she knew anything about a prior mortgage. Indeed it is not shewn that she received any advice or information beyond having the deed read to her word for word. It would be against all principle if a lady so situated were held bound by such a transaction.

Reliance was placed by Mr. *Doyne* on two subsequent mortgages executed by *Achan* after the death of *Hulas*, in which *Moti Ram's* debt is mentioned. In one of them it is stated that Rs.30,000 is borrowed for payment of the debt due to *Moti Ram* and others; and it is shewn that shortly afterwards the sum of Rs.7000 was paid to *Moti Ram*. But it does not appear that those deeds were so much as read over to *Achan*, to say nothing of the want of explanation.

The foregoing views render it unnecessary for their Lordships to enter on the question when *Enayet* attained his majority, or on the question how far the transactions of *Achan* could be of avail for the Plaintiffs who were not parties to them, both debated at the Bar. Their Lordships are clear that nothing was done to give *Moti Ram's* security greater validity than it originally possessed.

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That reduces the questions in the suit to one: viz., the validity of the mortgage by *Hulas* as against her successors. To prove its validity the Plaintiffs must shew, either that there was legal necessity for raising the money by a charge on *Khyrati's* estate, or, at least, that in advancing his money *Moti Ram* gave credit on reasonable grounds to representations that the money was wanted for such necessity. It has been above shewn that the Plaintiffs neither averred nor attempted to prove necessity until their case was being argued in the High Court. They laid their claim under *Hulas* as if she were the absolute owner. On the appeal they were treated with great indulgence, being allowed in effect to amend their case. One effect of *Hira Lal's* evidence is to shew the untrustworthiness of the statements in the mortgage bond on which the Sub-Judge relied to shew that *Moti Ram's* advance was applied to defray the marriage expenses of *Enayet* and the costs of the *Lucknow* suit. Out of the Rs.32,000 advanced nearly Rs.26,000 were applied in paying off hundis, Rs.12,400 being due to *Moti Ram* himself. We are told nothing of the amount of *Enayet's* expenses, nothing of any reason why they should be paid by his grandmother instead of his father, nothing of the nature of the *Lucknow* suit except that it was for ancestral property, nothing to shew that in March, 1873, any costs at all had been incurred by *Hulas*. So that the statements in the bond receive no effectual support and much contradiction from the new evidence.

But the Plaintiffs rely on an entirely new cause of necessity, viz., that *Khyrati's* money business, which had been carried on by *Hulas* under the management of *Lalji*, was in a critical state, and that it was necessary to borrow money in order to ward off total insolvency. On this point their Lordships agree with the High Court in thinking the effect of *Hira Lal's* evidence to be

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that at *Khyrati's* death the business was solvent on paper, but that there were bad debts the losses on which were never recovered, though the business struggled on for a good many years. The view of the High Court is that the widow ought to have wound up the business at once, and that not having done so, she could not allege necessity to mortgage the inheritance in order to keep the money business going. But they do not lay down any general rule for such cases, and they feel the difficulty of a decision in the entire absence of authority. Their Lordships also feel great difficulty, and they would require to know much more about the nature of the business in question, and of the condition and fluctuations of this particular business before venturing to endorse the opinion of the High Court.

Their Lordships prefer to rest this part of the case on the entire failure of the Plaintiffs to discharge the burden of proof which lies upon them. It has been above stated, in accordance with the often-cited case of *Hunooman Persaud* v. *Munraj Koonweree* (1), that, in order to sustain an alienation by a Hindu widow of the *corpus* of her husband's estate, it must be shewn, either that there was legal necessity for the alienation, or, at least, that the grantee was led on reasonable grounds to believe that there was. But the Plaintiffs have not proved, either actual necessity, even that *Moti Ram* believed that there was such necessity, or that he ever made any inquiry on the subject. He may have rested content with the vague and misleading statements in the deed. He may have considered, as the Plaintiffs have considered in this litigation, that the question of necessity did not concern him. He may have thought, as they apparently have thought, that he was taking title under an absolute owner. Anyhow, the Plaintiffs have not performed their legal obligation of proving that their ancestor performed his legal obligation, which was to inquire and satisfy himself that the widow from whom he was taking a charge upon her husband's inheritance had a proper justification for so charging it. This is sufficient to defeat the suit. Their Lordships will humbly advise Her Majesty to dismiss the appeal, and the Appellants must pay the costs.

Solicitors for Appellants: *Lattey & Hart.*
Solicitors for Respondents: *Pyke & Parrott.*

(1) 6 Moore's Ind. Ap. Ca. 393.

SARAT CHUNDER DEY AND OTHERS . . APPELLANTS;

AND

GOPAL CHUNDER LAHA (PLAINTIFF) AND OTHERS . . . . . RESPONDENTS.

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May 24, 27; *July* 23.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Estoppel—Indian Evidence Act, s. 115—*Estoppel by Representation on which another has acted—Purchaser of a Title by Estoppel not affected by Notice.*

Sect. 115 of the *Indian Evidence Act,* 1872, does not enact as law in *India* anything different from the law of *England* on the subject of estoppel.

It is quite unnecessary in order to create estoppel that the person whose acts or declarations induced another to act must have been under no mistake himself, or must have acted with an intention to mislead or deceive. Estoppel mainly results from the fact that another has been induced, in reliance upon personal representations, acts, or omissions, to act as he otherwise would not have acted.

Ganga Sahai v. *Hira Singh* (Ind. L. R. 2 Allah. 809); and *Vishnu* v. *Krishnan* (Ind. L. R. 7 Mad. 3) overruled.

Where a son acting as mooktear for his mother who was benamee for his father executed a mortgage on his mother's behalf and in her name, and received the mortgage money, *held* that he was estopped from disputing his mother's title to mortgage, whether he had been aware of its invalidity or erroneously believed it to be valid.

Held, further, that where a mortgagee has a good title by estoppel, he can give a good title to a purchaser under a mortgage sale, even though the purchase is made with knowledge of the circumstances to which the estoppel applies.

APPEAL from a decree of the High Court (Sept. 4, 1888), affirming, in second appeal with a slight variation, a decree of the District Judge of the 24 Pergunnahs (June 18, 1887), which reversed a decree of the Moonsiff of *Scaldah* (Dec. 30, 1886), and decreed the Plaintiff's suit with costs.

The facts are stated in the judgment of their Lordships.

The finding of the first Court on the evidence that the hiba was valid was reversed by the second Court, and accordingly the

* *Present:*—LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and LORD SHAND.

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only material parts of the Moonsiff's judgment were, "That it was impossible to resist the conclusion that *Arju Bibi* throughout treated the hiba property as her own property, and dealt with it in any way she pleased; that the Plaintiff's vendor, *Ahmed Hossein*, expressly acquiesced in his mother's conduct; and, finally, the Plaintiff himself believed that the hiba was a real transaction." Further, he found "that the mortgage to *Kalimuddin* was with the object of realising money for payment of revenue of talooks which were not included in the hiba; that the money borrowed was placed in the common fund, and all the members of the family, including, of course, Plaintiff's vendors, reaped the benefit of the transaction;" and that the Plaintiff's vendors were estopped by acquiescence in numerous sales, mortgages, &c., of hiba property, from disputing the validity of the hiba.

The District Judge found that *Arju Bibi* did not get possession of the hiba properties till after her husband's death; that there was no reliable evidence that her husband ever put her in possession, and that, consequently, the hiba, as a deed of gift, was invalid; that *Umed Ali* was not estopped from denying its validity, but that there was, perhaps, more reason for saying that the Plaintiff's vendors were estopped. But he held that they were at the time, practically, if not technically, infants; may have been under a *bonâ fide* mistake; may have honestly believed for a time that the hiba was valid; and that there was nothing to shew that it was their statements which induced the Defendants to purchase.

The High Court affirmed this decision. They held that assent by *Ahmed* to *Arju's* execution of *Kalimuddin's* mortgage deed did not bind him, unless he assented with knowledge of the invalidity of the hiba. As to any other ground of estoppel in *Pakjan's* administration suit, "both *Ahmed* and *Rahimunnissa* did support the validity of the hiba"; but there was nothing to shew that that circumstance was communicated to the Defendants. If the Plaintiff's vendors had been estopped, it would still have to be determined whether that estoppel was binding on the Plaintiff, in the absence of proof of knowledge on his part, of the circumstances which gave rise to it.

Doyne, and *Cowell*, for the Appellants, contended that both the Plaintiff's vendors acquiesced in *Arju Bibi's* mortgage of the property in suit to *Kalimuddin*. Both of them received the mortgage money and applied it to their own purposes; one actually, the other as having granted a power of attorney which on its true construction authorized the mortgage. The evidence against *Ahmed Hossein* on that point is conclusive. The High Court says he was an attesting witness to the mortgage deed; but that is not so. He executed it for his mother *Arju*, under her power of attorney; and, jointly with *Golam Hossein*, his mother's mokhtar, received it and applied it. The evidence against *Rahimunnissa* was less cogent, but it was contended was nevertheless sufficient to estop her from setting up her own title adversely to it. Accordingly, the Plaintiff's vendors were bound by the mortgage, and, therefore, after the sale of the mortgaged property by the Court in execution of a decree obtained by the mortgagee, they had no title, and their execution of the deed under which the Plaintiff sues was ineffectual. The doctrine of estoppel applies especially against *Ahmed*, who, though he did not sign in his own right, nevertheless, by the active part which he took in the transaction, induced the mortgagor to believe that he had no claim adverse thereto, and to act on that belief. Reference was made to *Indian Evidence Act*, sect. 115, which it was contended embodied the English law relating to estoppel, or at all events contained nothing contrary thereto. See *Luchmun Chunder Geer Gossein and Another* v. *Kalli Churn Singh and Others* (1); and *Ramcoomar Koondoo* v. *Macqueen* (2). [LORD WATSON referred to *Cornish* v. *Abington* (3), and LORD MORRIS referred to *Carr* v. *London and North Western Railway Company* (4).] Reference was also made to *Bhugwan Doss* v. *Upooch Singh* (5).

C. W. Arathoon, for the Respondent, *Gopal Chunder Laha*, who was heard only upon the case as it affected *Ahmed Hossein*, contended that no case of estoppel had been proved. The mortgagee advanced his money with notice of the infirmity of *Arju*

(1) 19 Suth. W. R. 292.
(2) Law Rep. Ind. Ap. (Suppl.) 40.
(3) 4 H. & N. 556.
(4) Law Rep. 10 C. P. 317.
(5) 10 Suth. W. R. 189.

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Bibi's title. There had been no mutation of names from her husband to herself; there was no evidence of her possession or of her exercise of the rights of ownership. See *Land Registration Act, Bengal*, 1876, sects. 38 and 44, to the effect that a proprietor shall effect registration of his name, and that a mortgagee may register also. There was no ground for saying that her husband in his lifetime had held her out to be the beneficial owner. Her children were practically minors at the date of the mortgage, and could not have effectively held her out to be the owner to their own prejudice. As for *Ahmed*, he had only signed as mooktear to convey to the mortgagee such a title as his mother had. He did not purport to convey his own title, and the mortgagee was content to take such title as *Arju* had, and did not stipulate for any additional security. The Appellants, moreover, bought from the mortgagee with full notice that his title was disputed, and had no equity to be relieved from its infirmity against those who were legally entitled. See also Civil Procedure Code, sects. 238, 331. He also cited and relied on *Vishnu* v. *Krishnan* (1); *Ganga Sahai* v. *Hira Singh* (2).

Doyne, replied.

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July 23.

The judgment of their Lordships was delivered by

LORD SHAND :—

This appeal has been brought against a judgment of the High Court at *Calcutta*. The case originated in the Court of the Moonsiff of *Sealdah*, against whose decision an appeal was taken to the District Judge of the 24 Pergunnahs. Accordingly the High Court was precluded by the provisions of sects. 584 and 585 of the Civil Procedure Code, 1882, from reviewing the judgment of the District Judge on the facts which he held to be established, and under the appeal had a question of law only for determination.

The Appellants, being desirous of having the scope of their present appeal enlarged, to the effect of allowing them to question the judgment of the District Judge in so far as it involved matters of fact as well as of law, presented an application to be allowed to appeal generally against that judgment; but their

(1) Ind. L. R. 7 Mad. 3. (2) Ind. L. R. 2 Allah. 809.

Lordships, on the 26th of July, 1890, refused this application. The appeal, therefore, now presents only a question of law for decision, that question being whether, on the facts as determined by the judgment of the District Judge, the Respondent *Gopal Chunder* is estopped from maintaining his present claim.

The case has assumed considerable importance because of the argument which has been maintained as to the principles regulating the law of estoppel, founded on the authority not only of the judgment of the High Court at *Calcutta* in this case, but also of other judgments in the High Courts at *Madras* and *Allahabad*, to which it will be proper that their Lordships should hereafter specially refer.

The facts which have given rise to the present controversy, as these are to be found in the judgment of the District Judge, and the deeds and documents to which he refers, may be shortly stated.

Gopal Chunder having in 1885 purchased from *Ahmed Hossein* and *Rahimunnissa Bibi*, a son and daughter respectively of *Umed Ali Shah Ostagar*, the shares to which they had succeeded on the death of their father of certain heritable property specified in the schedule to the original plaint, obtained a conveyance of these shares in his favour, dated the 28th of July, 1885. In December following he filed his plaint against the Appellants, who had been in possession of the property for about three years, claiming to have a declaratory decree that the sellers to him, *Ahmed Hossein* and *Rahimunnissa Bibi*, had held the right to the shares of the property purchased by him, and that he might, as purchaser from them, have a decree of partition of the lands, and be put into possession of these respective shares accordingly. In defence the Appellants explained that their predecessors had purchased the property, including the shares of *Ahmed Hossein* and *Rahimunnissa Bibi*, with certain other properties, at an auction sale in May, 1882, which took place under a decree in a mortgage suit obtained by one *Moonshi Kalimuddin* against *Arju Bibi*, the widow of *Umed Ali Shah Ostagar*, and mother of *Ahmed* and *Rahimunnissa*. They alleged, in their written statement, that *Arju Bibi* was the true owner of the property, having acquired right to it from her husband *Umed* in 1878; that *Arju Bibi* after her husband's death, which occurred on the 6th of

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August, 1879, on the 22nd of April, 1880, mortgaged the properties for a sum of Rs.2000 borrowed by her from *Kalimuddin*, who, in consequence of the failure in repayment of the money lent, obtained a decree on the 7th of December, 1881, declaring a mortgage lien on the property, and that, under the execution decree thereafter obtained, the property was sold, when it was purchased hy the Appellants' predecessors in title.

According to the Appellants' statement, *Arju Bibi* became the absolute proprietor of the property in question by virtue of a conveyance (hiba-bil-ewaz) bearing to be granted for an onerous consideration, granted in her favour by her husband, dated the 4th of January and registered on the 15th of February, 1878 (about eighteen months before he died), and it was in virtue of this title that, about nine months after her husband's death, she granted the mortgage already mentioned in favour of *Kalimuddin*, on the narrative that she had borrowed Rs.2000 from him "to meet my necessity." They alleged that *Umed Ali*, "in lieu of the money due to his wife *Arju Bibi* on account of her dower, made a *bonâ fide* gift of the disputed properties, and other properties, in favour of *Arju Bibi*, and put her in possession of the same;" and they further alleged that, even if the hiba by *Umed* in favour of his wife *Arju Bibi* was not effectual to defeat the rights of succession of his children, *Ahmed* and *Rahimunnissa*, from whom the Plaintiff derived his title, yet they were estopped by the actings of their father during his lifetime, and separately by their own actings after his death from maintaining the invalidity of the hiba, and from either themselves, or through any purchaser from them, challenging the mortgage by *Arju Bibi* in favour of *Kalimuddin*, which is the foundation of the Appellants' title.

In his plaint the Plaintiff alleged that the hiba by *Umed* in favour of his wife was a fraudulent and collusive deed intended to defeat the rights of his creditors; that there was no such dower due, as was stated in the deed to be the consideration for granting it; that no possession of the properties was ever given to *Arju Bibi*, but that the transaction was benami merely, and benami without even possession. And besides issues to try the question whether the hiba had been followed by possession and was a valid instrument, a further issue was sent for trial in these

terms: "Is the Plaintiff's claim barred by the rule of estoppel, and was Defendant a *bonâ fide* purchaser for value?"

The defence founded on the hiba, apart from the question of estoppel, was finally disposed of by the judgment of the District Judge. The Moonsiff, dealing with the issue on this part of the case and the evidence bearing on it, had come to the conclusion that the hiba was a "valid and binding document," not indeed a deed which could be supported on the ground of valuable consideration, but "a deed of gift, followed by seizin as required by Mahomedan law," and he accordingly dismissed the suit. But the District Judge reversed his judgment, and gave decree in terms of the Plaintiff's claim. In doing so, for reasons fully stated, he concludes his judgment on this part of the case by saying: "I hold that the deed of January, 1878, is invalid. It is invalid as a simple gift, because *Arju Bibi* did not get possession till after her husband's death; and it is invalid as a deed for consideration, because there was no consideration for it."

It follows that the only question for consideration now is that of estoppel. The Plaintiff's predecessors in title, *Ahmed Ali* and *Rahimunnissa Bibi*, by virtue of their rights of succession to their father, were entitled to dispose of their respective shares of the property in question unless they were estopped from so doing either by their father's acts or by their own conduct after his death.

The plea of estoppel was held by the judgment of the Moonsiff to be well founded, mainly, if not entirely, on the ground of the actings of *Umed Ali*. He held that not only had *Umed Ali* put his wife into ostensible possession of the property, but that he had proclaimed to all the world that he had made a valid hiba, and that, after granting that deed, in his dealings with the property he was only the agent of his wife, who was the true owner. The District Judge reversed this decision, taking a different view of the facts on which the Moonsiff's judgment rested, and his decision has been affirmed by the High Court.

In dealing with the question of estoppel now, it is obviously necessary to consider separately the alleged acts of *Umed Ali*, and the actings of his children, *Ahmed* and *Rahimunnissa*, with their respective legal consequences. It was very strongly urged upon their Lordships, chiefly on the authority of the case of

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Luchmun Chunder and Another v. *Kalli Churn and Others* (1873) (1), referred to in the judgment of the High Court, that the acts of *Umed Ali* were sufficient to create an estoppel as against his children in a question with the purchaser from their mother, *Arju Bibi*, the widow, and benamidar, as she must be taken to have been after the judgment of the District Judge.

The section (115) of the *Indian Evidence Act* (I. of 1872), which regulates the law on this subject, is in these terms: "When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

The mortgage which is the foundation of the Appellants' title was not granted by *Arju Bibi*, the benamidar, during her husband's life and in circumstances shewing that he consented to her granting the deed, in which case estoppel might have been successfully pleaded against his heirs in answer to any challenge of the deed by them. It was granted, as already stated, after the death of *Umed*, and consequently after his children, *Ahmed* and *Rahimunnissa*, had become proprietors of certain shares of the property held in title by their mother as benamidar.

In the case of *Luchmun Chunder* (1) a similar state of facts occurred, for there, as here, the mortgage was granted by the widow after her husband's death. But in that case the husband, *Ubotar Singh*, had never himself held the title to the property there in question in his own name. The title was derived from a third party and taken directly to his wife, and, according to the narrative of the conveyance, the price was paid from her stridhun fund. He was never in possession of it. His wife took possession and retained it, and, as stated by the High Court in their judgment in the present case, by a long series of public acts and declarations he did all he could to cause his wife to bear towards the public the character of owner. There were thus continuous declarations and acts by the husband calculated to cause any person dealing with the widow to believe that she was and had

(1) 19 Suth. W. R. 292.

been the proprietor in her own right, and in possession of the property purchased.

In the present case the facts are entirely different. The District Judge has held that "in fact, *Umed Ali* did nothing beyond execute and register the deed of gift." "There is," he observes, "no evidence that he held out *Arju Bibi* to the world as the owner of the property. He never parted with the possession." There was no mutation of names in the Government registers, and practically nothing different from an ordinary benami arrangement, which, as the District Judge observes, is "too common among Mahomedans to deceive anybody." It is clear that in this state of the facts there is no foundation for the plea of estoppel in so far as founded on the actings of *Umed.* The Appellants cannot point to any declaration, act, or omission on his part which they can successfully maintain could warrant them in believing, and acting on the belief, that *Arju Bibi* was the owner of the property which they purchased, and this has been expressly found by the District Judge.

Accordingly there remains only the question whether the Plaintiff is estopped from maintaining the invalidity of the hiba in consequence of the declarations or acts of his authors in title, *Ahmed* and *Rahimunnissa,* or either of them. The District Judge has held it to be proved that they had both reached majority at the date of the mortgage, at least this is plainly implied in the language he uses. His expression is they "were practically, if not technically, infants," and "presumably under their mother's influence." Accordingly it must be taken that they were of age to consent to the mortgage being granted, or by their acts or representations to bar themselves from challenging it.

As regards *Rahimunnissa,* the learned counsel for the Appellants did not profess to be able to refer to any representation or acting on her part which could bar her from challenging the validity of the hiba, or the title of any one taking a conveyance by *Arju Bibi,* or taking a title by virtue of the mortgage granted by her. There is no case of estoppel presented against her on account of personal representations, acts, or omissions; and so soon therefore as it is settled that her claim, or that of the Plaintiff, in so far as he derives title from her, is not barred by any

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representations or acts on the part of her father, it follows that to the extent of her interest the claim of the Plaintiff to the possession he demands must be allowed.

But in regard to *Ahmed*, and the Plaintiff's claim as a purchaser from him, a very different state of facts has been proved. The High Court in dealing with this question in their judgment say: "The circumstance of *Ahmed Hossein* having attested the deed of mortgage to *Kalimuddin* is relied on as estopping him from questioning his mother's power to execute the document;" adding: "we are unable to hold that the mere witnessing by him of that document, . . . or his assent to the execution of it, can create an estoppel binding on him, unless it were apparent that when he witnessed the deed and assented to it, he did so with knowledge of the invalidity of the hiba to confer upon *Arju*, and the fact that *Arju* had no power to create, a good title as against him, of which knowledge on his part there is no proof." The view of the law to be applied in the circumstances as thus stated will be immediately referred to; but their Lordships must, in the first instance, observe that the acting of *Ahmed* in reference to the granting of the mortgage by his mother went a great deal further than his being merely a witness to the execution of the deed; as to the effect of which, as a circumstance from which his assent to the deed might be inferred (had that been the state of the facts), their Lordships think it unnecessary here to express any opinion.

The facts, however, as appearing on the face of the mortgage itself (which is referred to in the judgment of the District Judge) are not that *Ahmed* was a witness to the execution of the deed, for the witnesses were other persons, but that he really reprerented his mother in the whole transaction. He acted with *Moonshi Golam Hossein* as am-mokhtar on her behalf under a power of attorney authorizing him to do so; he signed the mortgage on her behalf and in her name; and he and *Golam Hossein* received the money advanced by *Kalimuddin*, as appears from the official certificate by the Sub-Registrar indorsed on the deed.

Their Lordships are very clearly of opinion that these actings on the part of *Ahmed* create an estoppel against him, or any one

claiming in his right, from disputing the title of *Arju Bibi* to grant the mortgage to *Kalimuddin*. They amounted to a distinct declaration by him to the lender that the hiba in favour of *Arju Bibi* was a valid deed, or in any view, that if the document was open to legal objections, *Ahmed*, as the person entitled to challenge the deed, waived his right to do so, and consented for his interest to represent and to hold the hiba as valid, and consequently as giving a legal right to *Arju Bibi*, as the proprietor, to grant the mortgage. There was a distinct representation by *Ahmed* professing to act as his mother's attorney, that she was owner in possession, having a good title to create a valid mortgage affecting the lands. It is, in their Lordships' opinion, impossible to take any other view of the effect of *Ahmed's* conduct in the whole transaction, and particularly his signing the mortgage and taking payment of the money; and it is equally clear that the transaction was concluded on the footing of that representation, and that the creditor was thereby induced to lend the money on the security of the mortgage. It has been frequently said, in cases of this class, that the creditor is bound to make inquiry into the validity of such a title as *Arju Bibi*, the borrower, here possessed, and the obligation applies with great force in this case, in which the hiba was granted without consideration, and, as the least inquiry would have shewn, without any possession having followed on it. But inquiry, or, indeed, any anxiety as to the title of *Arju Bibi* to grant the mortgage as proprietor in virtue of the hiba in her favour, was made quite unnecessary by the representation and conduct of *Ahmed*, who was (so far as his share of the property was concerned) the sole person having a title or interest to challenge the validity of the hiba, and to object to the granting of the mortgage which he himself signed and delivered in exchange for the money paid to him.

In this state of the facts the terms of sect. 115 of the *Evidence Act* directly apply to the case, for *Ahmed*, having by his acts and the declaration which his acts involved, intentionally caused the lender to believe that *Arju Bibi*, as proprietor under the hiba, was entitled to grant the mortgage, neither he nor his representative the Plaintiff can be allowed to deny the truth of what was thereby represented, believed, and acted on.

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From the terms of the judgment of the District Judge it rather appears that he might have sustained the plea of estoppel but for certain considerations which are thus stated in different parts of his judgment. He says: "There is also nothing to shew that *Ahmed Hossein* was not under a *bonâ fide* mistake when he supported the hiba. He knew nothing of its execution, and was a minor when his father died. Until disabused by the High Court decision, he may have honestly believed that the hiba was genuine. . . . There is nothing to shew that *Ahmed Hossein* committed any fraud or contemplated committing any."

The District Judge further indicates that, even if the plea of estoppel might have been sustained in other circumstances, yet the purchasers would be open to the objection that they cannot avail themselves of the plea as being "*bonâ fide* purchasers for value and without notice," because, before the purchase was made under the mortgage sale, certain judicial proceedings before the High Court (referred to in a passage in the judgment just quoted) had been taken by or on behalf of *Pakjan*, a minor son of *Umed Ali*, in which it was determined that the hiba in favour of *Arju Bibi* was invalid, of which proceedings the purchasers were said to have been cognizant. The High Court in the closing part of the judgment under appeal also say: "Under these circumstances, we cannot hold that the Additional District Judge, either in determining, as he has done, that no estoppel was created, or in holding, as he has done, that the Defendants do not occupy the position of *bonâ fide* purchasers without notice, was wrong; and this absolves us from considering the further question which we might perhaps have otherwise found it necessary to determine, viz., whether if *Ahmed* and *Rahimunnissa* were estopped from disputing the hiba, that estoppel would have been binding on the Plaintiff, in the absence of proof or knowledge on his part of the circumstances that gave rise to it."

With reference to the views indicated in these passages of the judgments now under review, their Lordships think it right to say that it would make no difference in the effect to be now given to the plea of estoppel against a purchaser under the mortgage sale, though it clearly appeared that *Ahmed*, when he acted as he did in the mortgage transaction, was under the

belief that the hiba was a valid deed which he could not set aside; nor is it of any moment that he neither contemplated committing any fraud, nor, in fact, committed any fraud by his acts or representations. And their Lordships must further observe that, as the mortgage was effectual as a valid title to *Kalimuddin*, the lender, under which, in default of payment of the money lent, he was entitled to sell the property, it follows that any purchaser from him under a sale regularly carried out would acquire a valid title to the property, even though he were fully aware of all the circumstances which had attended the execution of the hiba, and that it had been originally invalid.

In regard to the first of these points, the section of the *Evidence Act* by which the question must be determined does not make it a condition of estoppel resulting that the person who by his declaration or act has induced the belief on which another has acted was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension. The Court is not warranted or entitled to add any such qualifying conditions to the language of the Act; but even if they had the power of thus virtually interpolating words in the statute which are not to be found there, their Lordships are clearly of opinion that there is neither principle nor authority for any such legal doctrine as would warrant this. The learned counsel who argued the present case on either side were agreed that the terms of the *Indian Evidence Act* did not enact as law in *India* anything different from the law of *England* on the subject of estoppel, and their Lordships entirely adopt that view. The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the

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person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet.* It may, in the result, be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do. The general principle is thus stated by the Lord Chancellor (*Campbell*), with the full concurrence of Lord *Kingsdown*, in the case of *Cairncross* v. *Lorimer* (1860) (1): "The doctrine will apply, which is to be found, I believe, in the laws of all civilised nations, that if a man, either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. . . . I am of opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." These words were used with reference mainly to acts indicating only subsequent consent to an appointment which had been made, and which might have been objected to when originally made; but they apply *a fortiori* in a case like the present, where the person estopped was a party to the transaction itself, which he, or others taking title from him, seek to challenge after a considerable interval of time.

There is no ground for the suggestion that the person making the representation which induces another to act must be influenced by a fraudulent intention, to be found either in the case just referred to or in the leading authorities of *Pickard* v.

(1) 3 Macq. 829.

Sears (1), *Freeman* v. *Cooke* (2), and *Cornish* v. *Abington* (3). In the more recent case of *Carr* v. *London and North Western Railway Company* (1875) (4), in the Appellate Court of the Common Pleas, the Master of the Rolls (Lord *Esher*) pointed out that no doubt in certain cases where estoppel is successfully pleaded against a party seeking to act at variance with his previous conduct or declarations on the faith of which another has acted, the original statement may have been made fraudulently; but, as his Lordship explained, a fraudulent intention is by no means necessary to create an estoppel, and accordingly he mentions other cases or classes of cases in which the determining element is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it. This case was approved of in the much later case of *Seton Laing & Co.* v. *Lafone* (1887) (5), by a unanimous judgment of Lord *Esher* and Lords Justices *Fry* and *Lopes*. In that case Lord *Esher* said: "An estoppel does not in itself give a cause of action; it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently, though without fraud, and another person acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel." To this statement it appears to their Lordships it may be added that there may be statements made, which have induced another party to do that from which otherwise he would have abstained, and which cannot properly be characterised as "misrepresentations," as, for example, what occurred in the present case, in which the inference to be drawn from the conduct of *Ahmed* was either that the hiba in favour of *Arju Bibi* was valid in itself, or at all events that he, as the party having an interest to challenge it, had elected to consent to its being treated as valid.

(1) 6 A. & E. 469.
(2) 2 Ex. 654.
(3) 4 H. & N. 549.
(4) Law Rep. 10 C. P. 316.
(5) 19 Q. B. D. 68.

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Reference has already been made to certain Indian cases which were cited and founded on in the course of the argument. These were the cases of *Ganga Sahai* v. *Hira Singh* (1880), in the High Court of Judicature at *Allahabad* (1), and *Vishnu* v. *Krishnan* (1883), in the High Court at *Madras* (2). In the former of these cases it was laid down by a majority of the Judges that if the element of fraud be wanting there is no estoppel. It was expressly said: "There must be deception, and change of conduct in consequence." The latter case was one in which, an adoption having taken place, the alleged adopted son claimed to set aside a deed of gift of certain property by his adoptive father, granted by him late in life in favour of a stranger. The deed was liable to be set aside as *ultrà vires* if the adoption was valid; but it was maintained separately that in any view the defendant was estopped from maintaining the invalidity of the adoption by a series of acts on the part of the adopting father, which had induced the belief on the part of the plaintiff that the adoption was valid, and in consequence of which the adopted son had abstained from claiming a share in the inheritance of his natural family. In the end, the adoption, which was that of a sister's son, was held, after a proof of the customary law of *Malabar*, to have been valid; but before allowing the proof the Court decided that the case of estoppel failed.

It would be most difficult to reconcile this decision with that of the case of *Luchmun Chunder and Another* v. *Kalli Churn and Another* (3), already referred to, and the views of this Committee as there expressed; and their Lordships would also have great difficulty in holding, as the High Court did, that a series of acts by which an adoption is professedly made and subsequently recognised, constitute a representation in law only and not of fact. But apart from this, the Court seems to have taken the view that in order to create estoppel the representations founded on must have been made with an intention to deceive; and an opinion was indicated that the law of estoppel under the *Indian Evidence Act* in some respects differed from the law of *England*. It was there said (4): "The term 'intentionally' was, no doubt,

(1) Ind. L. R. 2 Allah. 809.
(2) Ind. L. R. 7 Mad. 3.
(3) 19 Suth. W. R. 292.
(4) Ind. L. R. 7 Mad. 8.

adopted advisedly. By the substitution of it for the term 'wilfully' in the rule stated in *Pickard* v. *Sears* (1), and explained in *Freeman* v. *Cooke* (2) and *Cornish* v. *Abington* (3), it was possibly the design to exclude cases from the rule in *India* to which it might be applied under the terms in which it has been stated by the English Courts." Their Lordships are unable to agree in this view. On the contrary, as the rule had been modified in *England* by there substituting the word "intentionally" in the rule established for the word "wilfully" which had been previously used, it seems to their Lordships that the term "intentionally" was used in the *Evidence Act*, 1872, for the purpose of declaring the law in *India* to be precisely that of the law of *England*. Baron *Parke*, in the case of *Freeman* v. *Cooke* (2), in effect stated that the term "wilfully" used in the previous case of *Pickard* was really equivalent to "intentionally," in these words: "By the term '*wilfully*' . . . . we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." A person who, by his declaration, act, or omission, had caused another to believe a thing to be true and to act upon that belief, must be held to have done so "intentionally" within the meaning of the statute, if a reasonable man would take the representation to be true, and believe it was meant that he should act upon it. And to this view effect was given in the case of *Cornish* v. *Abington* (3) and the later cases.

It is unnecessary to quote the passages (pp. 8 and 9 of the Report) in the case of *Vishnu* v. *Krishnan* (4), indicating that in the opinion of the High Court it was necessary to prove an intention to deceive in order to make a case of estoppel. Their Lordships have already said enough to make it clear that they differ

(1) 6 A. & E. 469.
(2) 2 Ex. 654.
(3) 4 H. & N. 549.
(4) Ind. L. R. 7 Mad. 3.

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from the views to that effect expressed in that case and in the case of *Ganga Sahai* v. *Hira Singh* (1).

As already stated, the Plaintiff further maintained that the Appellants could not avail themselves of the plea of estoppel against him because before their predecessors made the purchase under the mortgage sale they were aware that it had been held by the High Court in another suit that the hiba which was the foundation of the title under which they purchased was invalid; but as already explained, their Lordships have no difficulty in repelling this contention. It may be true, and in any case it may be assumed to be true, that the Appellants' predecessors in title knew of the decision referred to. But it is equally true that whatever might have been held as to the invalidity of the hiba in a proceeding at the instance of *Pakjan, Ahmed*, or any one claiming in his right, was precluded by *Ahmed's* acts and representations from maintaining the invalidity of the hiba, or the mortgage granted by his mother so far as regards his share of the property. In any question with *Ahmed* or his representatives, *Kalimuddin* had obtained a valid mortgage, and as he had himself a valid title so he could give a good title to a purchaser under a mortgage sale, whatever might be the state of knowledge of the person purchasing. Their Lordships, therefore, are clearly of opinion that the Appellants are not precluded from maintaining, as they do successfully, that the plea of estoppel is good against *Ahmed*, and consequently good against the Plaintiff, in so far as regards the share of the property which *Ahmed* might have claimed as succession.

On the whole case their Lordships, on the grounds thus fully stated, will humbly advise Her Majesty to discharge the decrees of all the Courts below, and make a decree in favour of the Plaintiff for *Rahimunnissa's* share only, and that he get possession of that share by distinct partition, with costs in proportion in all Courts. The Plaintiff, however, must pay the costs of this appeal, in which the Appellants have obtained a substantial success.

Solicitors for Appellants: *Barrow & Rogers.*

Solicitors for Respondent *Gopal Chunder Laha*: *T. L. Wilson & Co.*

(1) Ind. L. R. 2 Allah. 809.

SYED NURUL HOSSEIN AND OTHERS . . DEFENDANTS;

AND

SHEOSAHAI . . . . . PLAINTIFF.

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March 24; May 21.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Estoppel—Indian Evidence Act, 1872, *s.* 115—*Transfer of Property Act*, 1882, *s.* 43.

Where a Plaintiff sued for possession in right of the next reversionary heir of the last full owner, and for setting aside an absolute deed of sale by his widow; and it appeared that his vendor had executed the said deed as general mokhtar, executor, and adopted son of the widow, making a general renunciation of title as mokhtar, but had after the widow's death derived title from the said reversionary heir:—

Held (1.) That the Plaintiff and his vendor were not estopped; the fair construction of the vendor's previous deed of sale being that he sold as agent for the widow, and did not represent that he was selling on his own account.

(2.) That the "*Transfer of Property Act*, 1882," sect. 43, was inapplicable, the said vendor not having represented that he was authorized to transfer any other interest than that of his principal.

APPEAL from a decree of the High Court (Jan. 19, 1886), reversing a decree of the second Sub-Judge of *Sarun* (Sept. 10, 1884).

The property in suit had belonged to *Dwarka Lal*, who died in 1819, leaving a childless widow, *Parbati Koer*.

On the 15th of May, 1868, *Parbati Koer* executed a conveyance thereof to the original defendant *Bibi Saidan*, by the hand of *Parsotim Das*, who is described therein as acting in the capacity of general mokhtar and executor under the will, dated the 16th of June, 1853 (meaning her own will), and adopted son of *Parbati Koer*, by virtue of a general power of attorney executed and delivered by *Mussummat*, dated the 30th of May, 1865.

Parbati died in 1879, at which time *Lokenath* was nearest reversioner to *Dwarka Lal*. *Lokenath* died in 1881, leaving *Parsotim Das* his heir.

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD HANNEN, and SIR RICHARD COUCH.

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The Respondent claimed under conveyance from *Parsotim*, to set aside the sale by *Parbati* as good only for her lifetime, having been made without legal necessity.

The Subordinate Judge dismissed the suit on several grounds, including that of estoppel, holding that *Parsotim* would have been estopped from suing to set aside a sale made by the widow through him and with his full consent, The High Court, on the other hand, held that *Parsotim* had not by assenting to and executing the widow's deed of sale barred himself from suing to set it aside; for he had executed it only in his character of mokhtar and adopted son of *Parbati Koer*, and not as representing the estate of *Dwarka Lal*, of which at that time *Lokenath* was the reversionary heir. It accordingly decreed the suit.

Branson, for the Appellant, contended that *Parsotim* had not been proved to have effectually conveyed his interests in the property in suit to the respondent so as to entitle him to maintain the suit. The petition of compromise relied on did not operate to convey to the Respondent the rights of *Parsotim Das* in the estate either of *Lokenath* or of *Dwarka Lal*. Even *Parsotim* himself could not have sued to set aside the deed which he had executed. On the true construction of the deed he had purported to convey his interest as well as *Parbati's*, to *Saidan Bibi*, or at least had represented that the widow was acting with his consent and under such circumstances as enabled her to pass the full ownership. *Parsotim*, and consequently the Plaintiff, were estopped from disputing *Saidan Bibi's* title. The purchase was made by her in reliance on such representation, and *Parsotim* was bound thereby.

Reference was made to *Indian Evidence Act*, 1872, sect. 15; *Transfer of Property Act*, 1882, sect. 43. Reference was also made, so far as the Appellant was trying to succeed on a different point from that taken in the lower Court, viz., an objection to the Plaintiff's title as derived from *Lokenath*, to *Hari Ravji Chiplunkar* v. *Shapurji Hormusji* (1). [SIR R. COUCH referred to Civil Procedure Code, sects. 582, 53, 565, and to *Eshenchunder Singh* v. *Shamachurn Bhutto and Others* (2).] See *Ram Doyal*

(1) Law Rep. 13 Ind. Ap. 66; S. C. Ind. L. R. 10 Bomb. 461.
(2) 11 Moore's Ind. Ap. Ca. 7.

Khan v. *Rajah Ojoodhia Ram Khan* (1); *Mylapore* v. *Yeo Kay* (2); *Ranee Cowulbas Koomour* v. *Loll Bahadoor Singh* (3); *Mohummed Zahoor Ali Khan* v. *Thakooranee Rutta Koer* (4); *Bhoobun Mohun Mundul* v. *Rash Beharee Paul* (5); *Luckee Kant Doss Chowdhry* v. *Sumeerooddi Tustar* (6); *Joseph* v. *Solano* (7); *Shibkristo Sircar* v. *Abdool Hakeem* (8); *Seton, Laing & Co.* v. *Lafone* (9).

The Respondent did not appear.

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May 21

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The suit in this appeal was brought by the Respondent against the wife of the Appellant *Syed Nurul Hossein, Mussummat Bibi Saidan,* who died pending the appeal, and is represented by the present Appellants. The plaint prayed for the determination and adjudication of the right of the Plaintiff to and for possession of mouza *Bhada Khord,* pergunnah *Pachlakh,* said to be acquired by *Dwarka Lal,* great-grandfather of the Plaintiff and husband of *Mussammat Parbati Koer,* with his ancestral money. *Dwarka Lal* died in 1819, intestate and childless, leaving *Parbati Koer* his widow, who entered into possession of his estate. On the 30th of May, 1865, *Parbati Koer,* described as widow and heiress of *Babu Dwarka Das* deceased, executed a mokhtarnama, by which she appointed *Parsotim Das,* described therein as son of the late *Juggernath Pershad* deceased, and her own adopted son, her general mokhtar, with power to alienate or sell any moveable or immoveable properties for any consideration. On the 15th of May, 1868, *Parsotim Das* executed a deed of sale, by which, in consideration of Rs.9575, he sold the whole of the mouza *Bhada Khord* to *Mussummat Bibi Saidan,* absolutely. He is described in the deed as "general mokhtar and executor under the will dated the 6th of June, 1853, and adopted son of *Mussummat Parbati Koer,* widow of *Babu Dwarka Das* deceased,

(1) 25 Suth. W. R. 425.
(2) Law Rep. 14 Ind. Ap. 168.
(3) 9 Moore's Ind. Ap. Ca. 39.
(4) 11 Moore's Ind. Ap. Ca. 468
(5) 15 Suth. W. R. 84.
(6) 21 Suth. W. R. 208.
(7) 9 B. L. R. 453.
(8) Ind. L. R. 5 Calc. 602.
(9) 19 Q. B. D. 68.

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by virtue of a general power of attorney," and the deed contains the following passage:—" My client, the vendor, and her heirs and representatives, and I as mokhtar, who am the general mokhtar, adopted son, and executor under the will of the vendor, and my heirs and representatives have now no claim, right, demand, or contention in respect to the property sold and the said consideration money against the vendee and her heirs and representatives. I, as mokhtar, have made a general renunciation of the same. Such renunciation is legal and valid."

Parbati Koer died on the 21st of June, 1879. The heir of *Dwarka Lal*, or *Dwarka Das*, as he was sometimes called, then entitled to succeed to his estate, was *Lokenath*, the grandson of *Dindyal Ram*, the paternal uncle of *Dwarka Lal*. *Lokenath* died on the 21st of September, 1881, leaving *Parsotim Das*, who was the grandson of *Behari Lal* his paternal uncle, and the Respondent and his five brothers, who were great-grandsons of *Behari Lal*, surviving him. On the death of *Lokenath*, a dispute arose between *Parsotim* and the Respondent and another person as to the right to succeed to his estate, the Respondent claiming to do so on the ground of *Lokenath* having brought him up as his son. Petitions for a certificate under Act 27 of 1860, were presented by the parties, and pending the decision of the case, a compromise was come to, which is stated in a petition to the Court, dated the 18th of February, 1882, of the Respondent and *Parsotim*. A division was thereby made of the estate, and the material part for the present suit is in the 4th paragraph. That states that *Parsotim Das* " has and shall have nothing to do with anything that may be acquired " by means of a suit which had been instituted by *Lokenath* to obtain possession of another mouza which had been sold, " or any other case instituted by virtue of the right of inheritance to the estate of *Dwarka Lal*, but that *Sheosahai Lal, alias Matru Lal* alone shall derive benefit or suffer losses from the same." The first Court properly decided that the Plaintiff was not the heir to *Lokenath*. They also held that he could not have any right, in consequence of the relinquishment of *Parsotim Das* in his favour, to recover possession of the property in dispute, on the ground that he executed all the documents relating to the alienation by *Parbati Koer*, that it

was made with his full consent, and as the reversionary heir of her husband he could not sue to have it set aside and recover possession from the purchaser, and also that the relinquishment was collusive. The suit was accordingly dismissed.

The Plaintiff appealed to the High Court, which decided upon the evidence that the instrument of compromise was executed for a *bonâ fide* purpose, and was not collusive. Their Lordships think this decision cannot be questioned. The High Court pointed out that, on the death of *Parbati Koer*, *Lokenath*, as the next heir, succeeded to the property, and that the first Court was in error in thinking that *Parsotim* was the reversionary heir of *Dwarka Lal*. They said they were of opinion that the first Court was in error in holding that the effect of the admission in the bill of sale would be to deprive *Parsotim* of the right which, as heir of *Lokenath*, he had of questioning the validity of the bill of sale. They also held that there was no proof of any necessity that would sanction the sale, and reversed the decree of the first Court, making a decree for possession by the Plaintiff of the property claimed, except a small portion which the Plaintiff admitted the Defendant was not in possession of. From this decree the present appeal was brought, and it has been heard *ex parte*.

The learned counsel for the Appellant took several objections to the judgment of the High Court. The first was founded upon the judgment of this Committee in *Eshenchunder Singh* v. *Shamachurn Bhutto and Others* (1), where it is said (p. 20) that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made, and (p. 24) that the equities and ground of relief originally alleged and pleaded by the Plaintiff should not be departed from. Several cases were referred to as illustrating the application of this rule. Their Lordships fully affirm it, but the substance of the case in the plaint in this suit is that the sale by *Parbati Koer* was invalid beyond her interest in or power over the estate. The plaint, indeed, states that the Plaintiff was the heir of *Lokenath*, and so entitled to raise the question. He was not the heir, but it was proved that he had

(1) 11 Moore's Ind. Ap. Ca. 7.

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the right of the heir, and the Defendant was allowed to take the same objections as he might have taken if *Parsotim* had been the Plaintiff. Moreover, it may fairly be inferred from the judgment of the first Court that this objection was not taken at the hearing before it. If it had been, the plaint and the issues might and ought to have been amended. It is very unlikely, if it was taken and was overruled, that there would be no notice of it in the judgments of either of the lower Courts. Their Lordships are of opinion that there is no weight in this objection.

The next objection was that no right passed from *Parsotim* to the Plaintiff by the solehnama or instrument of compromise; that property was not meant to be dealt with by it. The intention of the fourth paragraph, which has been quoted, appears to be that *Parsotim* should release or convey to *Sheosahai* his right of inheritance to the parts of *Dwarka Lal's* estate which had been sold by *Parbati Koer*, and for which one suit had been instituted and others might have to be. The words are sufficient to effect that intention, and to enable the Plaintiff to institute this suit.

The third objection was that *Parsotim* was estopped from bringing the suit by his execution of the deed of sale of the 15th of May, 1868, and consequently the Plaintiff was also estopped. The law in *India* on this matter is in the *Indian Evidence Act*, 1872. Sect. 115 of that Act says: "When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." What then is the declaration or representation in the deed? *Parsotim* is described as general mokhtar and executor under the will, and adopted son of *Parbati Koer*, widow of *Babu Dwarka Das*, deceased. The purchaser thus had sufficient notice to make it his duty to inquire as to what *Parbati* had power to sell. *Parsotim* says: "I have, as mokhtar, sold absolutely, without any reservation, the whole of 16 annas milkiut and malguzari of mouzah *Bhada Khord*," and, in the passage which has been quoted, "I as mokhtar, and my heirs and representa-

tives have no claim, right, demand, or contention, in respect to the property sold, and I as mokhtar have made a general renunciation of the same." There is no allusion to any right of *Parsotim* as heir of *Dwarka Lal*, which he was not, either then or when *Parbati Koer* died. The fair construction of the deed is that *Parsotim*, as agent, was only selling what his principal had power to sell. There is no representation that *Parsotim* was selling on his own account, and the Plaintiff is not denying the truth of any fact which is represented in the deed. The words "and my heirs and representatives have now no claim, &c." must be read with the context, and refer to the character of mokhtar. The transaction was the ordinary one of a sale by a Hindu widow, and their Lordships are of opinion that there was not any representation by *Parsotim* which would prevent the Plaintiff from bringing the present suit.

Lastly, the learned counsel referred to the Indian *Transfer of Property Act*, 1882, s. 43 of which says that "where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists." This is not applicable. *Parsotim* did not represent that he was authorized to transfer any other interest than that of his principal, *Parbati Koer*, and he did not profess to transfer any other. None of the objections to the decision of the High Court can, in their Lordships' opinion, be sustained, and they will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal.

Solicitor for Appellants: *J. F. Watkins.*

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June 24; July 23.

RAM GOPAL AND ANOTHER . . . . . PLAINTIFFS;

AND

SHAMSKHATON AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES, INDIA.

Practice—Code of Civil Procedure, s. 584—Second Appeal as to Legal Inferences from Facts as found.

Although a third Court cannot entertain an appeal under sect. 584 of the Code of Civil Procedure upon any question as to the soundness of findings of fact by a second Court; it can, nevertheless, adjudicate as matter of law upon the soundness of the conclusions which have been derived from those findings.

Where the third Court held that the evidence did not justify the second Court's conclusion that the Defendant was bound by a mortgage executed by his mother: *held*, that the judgment was substantially one of law, and was capable of being affirmed without interfering with the findings of fact of the lower appellate Court.

APPEAL from a decree of the Judicial Commissioner (Nov. 30, 1887) reversing a decree of the Commissioner of *Nerbudda* (April 25, 1887), which had affirmed a decree of the Deputy Commissioner of *Hoshangabad* (Dec. 4, 1886).

The facts and proceedings are stated in the judgment of their Lordships.

Doyne, for the Appellants, contended that under sects. 584 and 585 of the Code of Civil Procedure the Judicial Commissioner had no jurisdiction to reverse a decree of the lower appellate Court, which was based upon findings of fact from which no appeal lay. He dealt with the case as if it were one of first appeal, in which he was at liberty to examine the evidence with a view to ascertain the correctness of those findings. Reference was made to *Ramratan Sukal* v. *Nandu* (1); *Nivath Singh* v. *Bhikki Singh* (2); *Mussummat Durga Chowdhrain* v. *Jowahir Singh Chowdhri* (3).

* *Present*:—LORD HOBHOUSE, LORD MORRIS, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

(1) Law Rep. 19 Ind. Ap. 1. (2) Ind. L. R. 7 Allah. 649.
(3) Law Rep. 17 Ind. Ap. 122.

His decision, after such examination, supposing it to have been within his functions, was contrary to the weight of evidence. Supposing the Respondent not to have been originally bound by his mother's execution of the mortgage, his subsequent acceptance of all the benefits accruing thereunder made him in equity bound either to give effect to it or to restore the Appellants to their former position of usufructuary mortgagees.

The Respondents did not appear.

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July 23.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH :—

This is an appeal from the decision of the Judicial Commissioner of the Central Provinces in a suit brought by the Appellants against the first Respondent, and *Daud Rao* the father of the other Respondents, in the Court of the Deputy Commissioner, *Hoshangabad.* The plaint stated that the Defendant *Shamskhaton,* the mother of *Daud Rao* and widow of *Sarje Rao,* on the 4th of July, 1871, executed a mortgage for Rs.4000 of mouzah Bilawada in favour of the Plaintiffs and their deceased father. The fourth paragraph was as follows: "On the 29th of March, 1875, the Defendant No. 2 (*Daud Rao*), having filed a regular suit, obtained a decree for fourteen annas share in the said village. He is in possession (of the said village) and lives jointly. But he is bound to repay the sum for which the deed has been executed. Defendant No. 2 has ratified the deed. Hence he is made a party to the suit." The plaint then stated the money due from the Defendants was Rs.4000 on account of principal and Rs.5390 on account of interest, and prayed that the Defendant should be ordered to pay Rs.9390, with interest from the institution of the suit, and in default of payment that the mortgage should be foreclosed and the Plaintiff be put in possession of the village. The defence of *Daud Rao* was that at the time of the execution of the mortgage he was absent from home in the service of the Raja of *Nagpur,* and knew nothing of the transaction; that when he returned from *Nagpur* and heard that a deed had been obtained by the Plaintiffs from his mother by fraud he at once sued his mother, and had his share of fourteen annas in the village

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separated; that there was no consent on his part to the deed. The defence of *Shamskhaton* was that the deed was obtained by fraud.

The issues framed were: "1. Was the deed for Rs.4000 fraudulently executed? 2. Did Defendant No. 2 ratify the deed of mortgage executed by Defendant No. 1? 3. Is Defendant No. 2 liable for the debt incurred by Defendant No. 1?" Evidence was given on both sides. The Deputy Commissioner, in his judgment delivered on the 4th of December, 1886, found the first issue for the Plaintiffs. On the second issue, after stating the evidence applicable to it, he said, "From the above evidence I hold that Defendant No. 2 was fully aware of the execution of the deed of mortgage by his mother, Mt. *Shamskhaton*, and admitted his liability for the debt, and thus ratified the deed of mortgage. I therefore find the second issue in favour of Plaintiffs." The ground of his holding that the Defendant No. 2 had admitted his liability for the debt on the mortgage is the construction which he put upon a passage in a judgment of the Deputy Commissioner, dated the 7th of July, 1875, in a suit between the Plaintiffs and Defendants upon a bond executed by both Defendants, in which the Deputy Commissioner says that in a bond for Rs.42, which had been produced in Court, reference is made to two other documents, which reference is equivalent to an admission of liability. The bond thus referred to, which was executed by *Daud Rao* in favour of *Jiwan Ram*, and is dated the 9th of August, 1872, contains the following passage: "Besides this there are two separate deeds of previous dates; one is the mortgage deed of village, and the other is a bond. The money due under them is also duly repayable." Here it is to be observed, that whether this is an admission by *Daud Rao* of liability under the mortgage depends upon the construction of these words, especially the word "repayable." They may and would ordinarily mean, repayable by the party liable to pay.

There was no finding on the third issue, and a decree was made against both Defendants, directing them to pay Rs.9390 with costs of suit within six months from its date, failing which they were to be absolutely debarred from redeeming the mortgage. From this decree the Defendants appealed to the Commissioner of the *Nerbudda* Division. His judgment was delivered on the

25th of April, 1887. He affirmed the finding of the Deputy Commissioner on the first issue. As to the second, he said that the evidence upon which the first Court held the ratification to be proved was:—

1. The admission of Defendant No. 2 that he became aware in August, 1872, of the existence of the mortgage deed.
2. A letter marked I, written by him, asking the Plaintiffs not to sue on the deed.
3. A copy of the judgment of the Deputy Commissioner, dated the 7th of July, 1885.
4. A copy of the bond marked L for forty-two rupees.
5. The fact of the Defendant No. 2 at first allowing his mother to retain the whole of the family property, and then receiving seven-eights of it from her.

He rejected the letter marked I, as not proved to be genuine, and said the judgment of the Deputy Commissioner proved two things: "(1.) That in July, 1875, Defendant No. 2 was made liable on a bond executed by Defendant No. 1 alone. (2.) That the original of Bond L was then produced," and that the statement in it shewed that the mortgage deed was "known to and accepted by Defendant No. 2." A finding that the bond shewed that the mortgage deed was accepted by the Defendant, as a binding obligation upon him, would be an inference of law, an inference which, in their Lordships' opinion, is not a just one from the facts which the Commissioner held to be proved. The knowledge of the mortgage, and saying that the money due upon it was repayable, do not amount to an agreement by him to be bound by it. As the mortgage did not purport to be made in any way on behalf of *Daud Rao*, it was not a case for ratification. A new agreement or obligation was necessary to bind him. The judgment of the Commissioner then proceeds to say: "Lastly there is the conduct of Defendant No. 2 in allowing Defendant No. 1 notwithstanding that she was entitled to only one-eighth of the property, to take possession of the whole of the property, with the exception of Rs.1400; all the rest of the 4000 entered in the mortgage debt was on account of the former proprietor's debt, and the Government revenue of the mortgaged village. The mortgage deed, therefore, constituted a charge on the village,

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which Defendant No. 2, as the owner, was liable to pay." Here the fact found is the conduct of *Daud Rao*. That there was a charge on the village which he as owner was liable to pay is an inference of law, and it is one which the fact found is not sufficient to justify. Mr. *Doyne*, in support of this part of the judgment, referred to the previous mortgage by *Sarje Rao*, which is marked E in the record. But at the head of it are the words "rejected" —"not proved," with the initials of the Deputy Commissioner, and therefore he could not be allowed to use it. The Commissioner confirmed the decree of the first Court, with costs of the appeal.

Daud Rao then appealed to the Judicial Commissioner of the Central Provinces, and the first question for consideration is whether the Judicial Commissioner had power to entertain the appeal. Section 584 of the last Civil Procedure Code (Act XIV. of 1882), which is applicable to the Court of the Judicial Commissioner, says that "unless when otherwise provided, ... from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds (namely)—(*a*), the decision being contrary to some specified law or usage having the force of law; (*b*) the decision having failed to determine some material issue of law or usage having the force of law; (*c*.) a substantial error or defect in the procedure as prescribed by this Code or any other law which may possibly have produced error or defect in the decision of the case upon the merits." Section 585 says that "no second appeal shall lie except on the grounds mentioned in sect. 584." The effect of these sections has been stated in several judgments of this Committee. It will be sufficient to refer to the last of them: *Ramratan Sukal* v. *Mussumat Nandu* (1), where it is said, "It has now been conclusively settled that the third Court, which was in this case the Court of the Judicial Commissioner, cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court; if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final." The present case does not come within that rule. The facts found

(1) Law Rep. 19 Ind. Ap. 1.

need not be questioned. It is the soundness of the conclusions from them that is in question, and this is a matter of law.

Their Lordships think it is proper that they should notice a construction which has been put upon sect. 584, in a case in the High Court at *Allahabad: Nivath Singh* v. *Bhikki Singh* (1), where it is said by the learned Chief Justice, that by "specified law" in clause (*a*), is meant "the statute law," and by "usage having the force of law," is meant "the common customary law of the country or community." Their Lordships cannot approve of this construction. "Usage having the force of "law" means a local or family usage as distinguished from the general law, of which there are many instances, and "law" is not to be limited in its meaning to statute law. This is shewn by clause (*b*), where the words must be intended to mean the same as in (*a*). In the corresponding provision in the first Civil Procedure Code (Act VIII. of 1859) as to special appeals (which they are there called), the words are "contrary to some law or usage having the "force of law." The meaning of law and usage there is clear, and there is no reason for thinking that the words were intended to have a different meaning in the Act of 1882 or in the Civil Procedure Code of 1877, where the word "specified" is first introduced. In the judgment of this Board in *Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri* (2), it is said that "specified" in sub sect. (*a*), means "specified in the memorandum or grounds of appeal"; and their Lordships adhere to this opinion.

The Judicial Commissioner reversed the decree of the Commissioner as regards *Daud Rao* and his share, and made a decree against him for seven-eighths of Rs.500 only, (a debt of his father *Sarje Rao*, of which he has agreed to pay his share), with costs proportionately in all Courts. The Judicial Commissioner went fully into the facts of the case, and said that in his opinion the evidence was not sufficient to justify the conclusion of the Lower Appellate Court, and that it could not be held on that evidence that the Defendant *Daud Rao* was bound by the mortgage executed by his mother. The judgment is substantially upon the question of law. Their Lordships taking the facts to

(1) Ind. L. R. 7 Allah. 649. (2) Law Rep. 17 Ind. Ap. 122.

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be as found by the first Appellate Court, approve of it, and being of opinion that it was competent for the Judicial Commissioner to hear the appeal, they will humbly advise Her Majesty to affirm his decree and to dismiss this appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*

J. C.*
1892
June 21.

KAMESWAR PERSHAD . . . . . PLAINTIFF;

AND

RAJKUMARI RUTTUN KOER AND OTHERS. DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Limitation—Charge on Immoveable Estate—Bond—Res judicata—Sect. 13, *Code of Civil Procedure.*

Unless the amount recoverable under a bond is made a charge upon immoveable estate, a suit in respect of it is barred in six years.

Where the personal liability of the Defendant might and ought to have been claimed against him in a former suit brought by the same Plaintiff on the bond to enforce such alleged charge:—

Held, that a new suit for that purpose is barred, as *res judicata* under sect. 13 of the Code of Civil Procedure.

APPEAL from a decree of the High Court (May 8, 1889) reversing a decree of the Sub-Judge of *Gya* (Feb. 23, 1888).

The question in appeal was, Is the Appellant's suit to have the Defendant, *Run Bahadoor*, declared liable to satisfy a decree on a bond, dated the 1st of March, 1872, executed by Ranee *Asmedh Koer*, barred either by limitation or as *res judicata*?

The facts are stated in the judgment of their Lordships.

Cowie, Q.C., and *C. W. Arathoon*, for the Appellant, contended, first, that the suit was not barred by limitation. The bond debt was a charge on the immoveable estate, Rajah *Run Bahadoor* having specifically undertaken to pay it "out of the profits of the said properties." Reference was made to Act XV. of 1877, arts. 10, 122, 132. The suit fell under art. 132, and not under

* *Present*:—LORD MORRIS, LORD HANNEN, SIR RICHARD COUCH, and LORD SHAND.

art. 116 or any article in Part VII. giving six years. *Run Bahadoor's* liability resulted from his agreement with Rani *Asmedh*, made upon his taking over the estate on which it was or became charged within the meaning of art. 132. Article 122 applied in view of the suit being based on the decree of the High Court against the Ranee, dated the 2nd of July, 1878. With regard to *res judicata*, some part of the money secured by the decree sought to be executed has been admitted and found to be payable by the Defendant, and accordingly this suit as to the balance is not barred. Besides, there was no decision that the rights under the ikrar were not effective against the immoveable estate of the Rani in the Defendant's hands; but only that the bond debt of the Rani was not so chargeable. [SIR R. COUCH:—It is the same cause of action in both suits, and you joined both of them, the widow and *Run Bahadoor*, and could have raised your present contention in that suit.] See sect. 2 of 1859 and sect. 13 of Act X. of 1877. The cause of action is not the same as in 1876. That former suit was not under any liability personally created by the Defendant *Run Bahadoor*, but because he had got into possession of the immoveables under the ikrar. Its object was to render the *corpus* of the estate chargeable, founded on the ikrarnamah. This suit is to enforce his personal liability, which was not in question in the former one, under his agreement with the Rani to satisfy the decree against the Rani. See Act X. of 1877, sects. 42 and 43, as to framing a suit. Reference was made to *Woomatara Debia* v. *Unnopoorna Dossee* (1); *Denobhundoo Chowdhry* v. *Kristomonee Dossee* (2); *The Shivagunga Case* (3).

Doyne, for the Respondent *Rajkumari*, was not heard.

The judgment of their Lordships was delivered by

LORD MORRIS:—

The facts, which it may be necessary briefly to recapitulate in order to make clear the grounds upon which their Lordships are

(1) 11 Beng. L. R. 158. (2) Ind. L. R. 2 Calc. 152.
(3) 11 Moore's Ind. Ap. Ca. 50, 61.

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about to decide this case, are as follows: Ranee *Asmedh Koer* was the senior widow of Rajah *Modhnarain Singh*, and as such was entitled to a widow's interest in certain mouzahs, part of the property of her deceased husband. She appears to have incurred debts to the Appellant, and on the 1st of March, 1872, she executed a bond to him for the sum of Rs.61,000, to meet the amount of her liability, and thereby hypothecated the mouzahs. On the 31st of August, 1872, an agreement was entered into between her and *Run Bahadoor* whereby she surrendered her interest in her husband's estate to *Run Bahadoor*, upon condition that he was to pay her an allowance of Rs.24,000 for her maintenance, and was to pay off her liabilities. On the 31st of March, 1876, the Appellant instituted a suit on the bond against the Rani and *Run Bahadoor*, which was decreed by the Subordinate Judge on the 6th of December, 1876, in the terms of the prayer. The High Court varied this decree, and by their decree of the 2nd of July, 1878, held the Rani personally liable for the amount covered by the bond with interest thereon, and held the mortgage not to be binding upon the estate. The matter was brought before this Board by way of appeal, and in 1880 the appeal was dismissed. In 1884 the Appellant sought to execute, against *Run Bahadoor* and the properties in his possession, the personal decree obtained against the Rani, who was dead. The Court to which the application for execution was made held that the decree could not be executed against *Run Bahadoor*, except in respect of personal property of the Rani which had come to him on her death. The High Court on appeal upheld this decision by their judgment of the 14th of January, 1886. On the 13th of January, 1887, the Appellant instituted the present suit against *Run Bahadoor*, praying to have him declared liable, under the agreement of the 31st of August, 1872, to satisfy the decree obtained against the Rani on the bond.

The first objection taken to the suit was that it was barred by the law of limitation.

Primâ facie, this would be obvious, for the bond was by its terms made payable in the month of September, 1875, whereas the right to sue the Defendant for a personal debt would be limited to six years, and the present suit was not commenced

until the month of January, 1887, an interval of over eleven years. The Appellant, however, alleges that he comes within the limitation applicable to a charge on immoveable property, which would be twelve years; if he is right in that contention, the suit, being instituted eleven years and some months afterwards, is not barred.

But it is necessary for the Appellant to satisfy this Board that the charge upon the estate was one which was binding upon it, and, bearing in mind the facts of the earlier suit, and what was said by the Board in that case, their Lordships are not satisfied that it was so binding in fact. In this view, the period of six years, and not the period of twelve years, applies in this case, and the suit is consequently barred.

Another ground appears to their Lordships fatal to the suit, and that is that it offends against the principle of *res judicata* laid down in the Code of Civil Procedure of 1882. In the suit of 1876, *Run Bahadoor* was joined as a Defendant, upon the ground that the Rani had, under the agreement of 1872, given over to him the whole of her properties, including what was mortgaged by the bond, but no relief was claimed against him personally. It was clearly competent for the Appellant to have alleged in that suit the personal liability which he now says he can establish against *Run Bahadoor*. He had relied upon the fact of the mortgage being one affecting the whole estate; but he could have also alleged that *Run Bahadoor* was bound at all events to pay him, in consequence of the agreement which he had entered into with the Rani. This, however, he did not do.

Sect. 13 of the Code of Civil Procedure of 1882 says: "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court." Explanation 2 of that section says: "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter

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directly and substantially in issue in such suit." Their Lordships think that the present ground of attack was a good ground of attack in the suit of 1876, because the money had not been paid in September, 1875, the date named in the bond.

That it "might" have been made a ground of attack is clear. That it "ought" to have been, appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word "ought" would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon *Run Bahadoor*, and it appears to their Lordships that the matter "ought" to have been made a ground of attack in the former suit, and therefore that it should be "deemed to have been a matter directly and substantially in issue" in the former suit, and is *res judicata.*

But it has been urged that the first suit having been brought in 1876, the Code of Civil Procedure of 1877, and not the Code of 1882, governs the case; but it is to be observed that the Code of 1882 says that "No Court shall try any suit or issue"; that is, shall try after the passing of that Act, though the circumstances had arisen previously.

Neither should it be lost sight of that the Act of 1877 and the Act of 1882 were not introducing any new law, but were only putting into the form of a Code that which was the state of the law at the time.

The state of the law at the time was, that persons should not be harassed by continuous litigation about the same subject-matter.

Upon these grounds their Lordships will humbly advise Her Majesty that the judgment of the High Court should be affirmed, and the appeal dismissed. The Appellant must pay the costs of the appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitor for first-named Respondent: *S. G. Stevens.*

END OF VOL. XIX.

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BANKRUPTCY.] Where a trading firm assigned all its assets for the time being as security for its debts, receiving a substantial simultaneous advance and a promise of future advances, *held*, that such a mortgage was valid against the firm's assignee in insolvency:—Where such trading firm subsequently to the assignment was reconstituted, new partners being introduced with the mortgagees' assent, the arrangement being that the assets of the new firm should continue as security, a new payment being made to it or for its benefit by the mortgagees:—*Held*, that the said assignment continued to operate both as regards the new partners, and also as regards the assets for the time being of the new firm. KHOO KWAT SIEW *v.* WOOI TAIK HWAT 15

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—— **ss. 311-313**: *See* PRACTICE. 2.

—— **s. 584**: *See* PRACTICE. 4.

DECREE FOR POSSESSION.] In a suit for proprietary possession the Plaintiff deduced a title by inheritance coupled with an allotment to his ancestor of the land in suit by Commissioners of Partition; the Defendant pleaded as to a portion of the land that it had been included in such allotment by mistake of the Commissioners, and that he had derived a title thereto adversely to the Plaintiff:—*Held*, that there being no evidence of any error in the allotment, and no evidence of any adverse title in the Defendant, the High Court were in error in modifying a decree for possession of the whole of the land claimed and in measuring off by mere guesswork a portion

DECREE FOR POSSESSION—*continued.*

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2. —— Where a Plaintiff sued for possession in right of the next reversionary heir of the last full owner, and for setting aside an absolute deed

ESTOPPEL—*continued.*

of sale by his widow; and it appeared that his vendor had executed the said deed as general mokhtar, executor, and adopted son of the widow, making a general renunciation of title as mokhtar, but had after the widow's death derived title from the said reversionary heir:—*Held* (1.) That the Plaintiff and his vendor were not estopped; the fair construction of the vendor's previous deed of sale being that he sold as agent for the widow, and did not represent that he was selling on his own account.—(2.) That the "*Transfer of Property Act*, 1882," sect. 43, was inapplicable, the said vendor not having represented that he was authorized to transfer any other interest than that of his principal. SYED NURUL HOSSEIN *v.* SHEO-SAHAI - - - - - - - 221

EVIDENCE.] Case in which it was held on the evidence and a discussion of surrounding probabilities that the First Court was in error in finding that a promissory note sued upon had been executed by the Defendant. HURRICHURN BOSE *v.* MONINDRA NATH GHOSE - - - 4

2. —— Case in which the evidence of a claim against a deceased rajah's estate, founded upon money advanced on a parwana alleged to have been executed by him, was held, overruling the first Court, insufficient to establish the transaction. LACHMI PARSHAD *v.* MAHARAJAH NARENDRO KISHORE SINGH BAHADUR - - - 9

EXECUTION OF BOND BY HINDU WIDOW.] *Held*, that the *onus* of proving due execution of a bond sued upon lay upon the Plaintiff, who relied upon the signature of a Hindu widow as binding the estate which she represented.—*Baboo Kameswar Pershad* v. *Run Bahadoor Singh* (Law Rep. 8 Ind. Ap. 8) referred to.—A third Court cannot entertain an appeal upon any question as to the soundness of a finding of fact by a second Court, however unsatisfactory such finding, if examined, may be. RAMRATAN SUKAL *v.* MUSSUMAT NANDU 1

FINDING OF FACT BY SECOND COURT: *See* EXECUTION OF BOND BY HINDU WIDOW.

GIFT AND ACCEPTANCE OF CHILD: *See* HINDU LAW. 2.

GIFT TO A THAKOOR: *See* HINDU LAW. 3.

GUMASTAH: *See* DESHMUKH AND GUMASTAH.

HINDU LAW.] Where a Hindu widow executed an ikrarnamah in favour of her daughter's son, then the apparent reversionary heir, in which she transferred to him the management of her husband's property, but did not surrender her widow's estate therein:—*Held*, as regards the immoveable property sued for, that such daughter's son could not after the widow's death maintain title in exclusion of another daughter's son, born after the date of the ikrarnamah, who at the death of the widow became entitled as one of her husband's reversionary heirs. According to Hindu law, in order to accelerate the estate of the reversionary heir, a widow must convey to him her estate absolutely. BEHARI LAL *v.* MADHO LAL AHIR GYAWAL - - - - 30

HINDU LAW—*continued.*

2. —— There being concurrent findings by the Courts below that although the ceremonies of adoption had been performed there had not been an actual gift and acceptance of the child:—*Held*, that the adoption was invalid.—Where a testator clearly indicated his intention before making an adoption, to give the greater portion of his property to the child to be adopted, the bequest being by name and not dependent upon the adoption, but appearing from the terms of the will to have been made for reasons independent of the adoption though likely to lead to it:—*Held*, that although the adoption was invalid, the bequest was effectual. BIRESWAR MOOKERJI *v.* ARDHA CHUNDER ROY CHOWDHRY - - 101

3. —— It is settled law that a Hindu simultaneous adoption is invalid.—Where a Hindu bequeathed all his property to a Thakoor, to secure the proper performance of the sheba and other ceremonies, directing his two widows each to adopt a son, both of which sons he appointed shebaits, subject to the control of the widows during minority, with monthly allowances from the surplus income, the residue being undisposed of; and the widows purported to adopt under such direction, at the same time binding themselves each to the other under an ikrar which recognised the rights of the boys to nurture and the enjoyment of the estate, partitioned the said estate both as between the widows and the boys until the younger attained majority, and provided that the surplus income of each moiety should be accumulated and handed over by each widow to her own son on coming of age:—*Held*, in a suit by the son of the elder widow, after his mother's death, against the younger widow and her son, that under the will the widows, as heirs, become shebaits, and entitled for the widows' estate to such interests in the testator's property as were undisposed of by the will.—Second, that the boys could not take under the will either as adopted sons or as shebaits.—Third, that although the boys were neither adopted sons of the Rajah nor formal parties to the ikrar, yet they were parties to the transactions of which the ikrar formed part, and that the Plaintiff could enforce the provisions thereof against the surviving widow so far as she had bound herself to deal with the estate in his favour.—Fourth, that each son was entitled on attaining majority to a moiety of the surplus income of the estate during the life of the surviving widow, and to the accumulations thereof, accounts against the widows being directed accordingly.—The widow having died before judgment, the testator's heir was added as a party, application to be made to the Court below to add all other necessary parties. SURENDRAKESHAV ROY *v.* DOORGASUNDARI DASSEE - - 108

4. —— A mortgage by a Hindu widow even for necessary purposes without the concurrence of her co-widow is not binding upon the joint estate which has descended from their deceased husband so as to effect the interest of the co-widow.—*Quære*, whether a case for borrowing without the co-widow's consent could be established so as to empower one widow so to bind the estate; certainly it cannot where the concurrence of the co-widow was not even applied for. In

HINDU LAW—*continued.*

this case the mortgage on its true construction did not purport to bind the whole estate. SRI GAJAPATI RADHAMANI GARU *v.* MAHARANI SRI PUSAPATI ALAKARAJESWARI - - - 184

HINDU WIDOW.] To prove the validity of a mortgage by a Hindu widow of her husband's estate the burden of proof is on the mortgagee, to shew either that there was a legal necessity therefor, or, at least that, in advancing his money he gave credit on reasonable grounds to representations that the money was wanted for such necessity.—*Hunooman Persaud Panday* v. *Munraj Koonweree* (6 Moore's Ind. Ap. Ca. 393) followed. —Where as against the daughter, who had joined in the said mortgage, a subsequent deed of ratification was relied upon, *held*, that there being no evidence that in signing such deed she understood that she was subjecting her expectant estate to a burden which she was gratuitously undertaking, she was not bound thereby. LALA AMARNATH SAH *v.* RANI ACHAN KUAR - - - 196

IKRAR BETWEEN TESTATOR'S WIDOWS: *See* HINDU LAW. 8.

IKRARNAMAH BY HINDU WIDOW IN FAVOUR OF REVERSIONARY HEIR: *See* HINDU LAW. 1.

INDIAN EVIDENCE ACT, 1872, s. 32.] *Held*, that a register of marriages having been made by a Mujhtahid in the discharge of his professional duty and kept by the Kazi, is admissible and relevant evidence within sect. 32 of the *Indian Evidence Act*, 1872, in a suit to recover dower between the parties to a marriage recorded therein:—*Held*, upon all the evidence in the case, including the said register, that the High Court were in error in reversing the decree of the lower Court to the effect that the stipulation dower was Rs.50,000. and that the Plaintiff was entitled thereto. ZAKERI BEGUM *v.* SAKINA BEGUM 157

—— s. 115; *See* ESTOPPEL. 1.
ESTOPPEL. 2.

INJUNCTION: *See* LAND TENURE.

INVALID SETTLEMENT: *See* MAHOMEDAN LAW.

INVALID WAKFNAMA: *See* MAHOMEDAN LAW.

LAND TENURE.] It is recognised law in *India* that a man may set up a ferry on his own property, and take toll from strangers for carrying them across, and may acquire by grant or user the right to do so on the property of others, whether he is co-owner with them or not.—Where he sets up a ferry on property of which he is co-owner with others whom he does not dispossess, and whose user, whether of land or ferry, he does not restrict, and expends his own money in so doing, and thereby reaps a profit for himself:—*Held*, in a suit by such co-owners for an injunction and a share of the profits, that as the Defendant's profits had been earned by his exclusive efforts and without excluding any co-owner from his use of the joint property, such suit must be dismissed. Costs refused, as the Defendant had unsuccessfully set up a claim to an exclusive title based on adverse possession.—*Watson* v. *Ram Chand Dutt* (L. R. 17 Ind. App. 110) considered. The Courts should be very cautious of interfering

LAND TENURE—*continued.*

with the enjoyment of joint estates as between their co-owners.—A second appeal will lie on a finding of adverse possession, when such finding is a mixed question of law and fact depending upon the proper legal conclusion to be drawn from the findings as to simple facts. MAHARAJAH SIR LUCHMESWAR SINGH BAHADOOR *v.* SHEIK MANOWAR HOSSEIN - - - - 42

LEGAL NECESSITY: *See* HINDU WIDOW.

LESSOR AND LESSEE.] In a suit to recover arrears of rent, it appeared that the Defendant was heir to a deceased lessee of the Plaintiffs, and that during his minority his guardians, the mother and widow of the lessee, renewed the lease, and subsequently surrendered it to the Plaintiffs:—*Held*, that the Plaintiffs, having failed to shew that the Defendant was either bound by such renewal or had subsequently ratified it, could not convert their suit into one against the estate of the deceased and the Defendant as representing it; and, further, that the renewal was in fact made by the mother and widow for themselves and in their own interest, and did not establish any relation between the Plaintiffs and the estate. INDUR CHUNDER SINGH *v.* RADHAKISHORE GHOSE - - - 90

LIMITATION.] In boundary cases the Appellant must come prepared to shew clearly where the decree appealed from is wrong, and what other course is right; it is insufficient to raise doubts as to the correctness of the decision.—Where the Plaintiff suing in 1881 shewed title and possession in 1857 of the lands in suit, *held*, that possession must be presumed in the absence of evidence to the contrary to have continued to within twelve years of suit, and to shew the boundary line between the lands in suit and the Defendant's estate. It is unnecessary to prove acts of possession by the Plaintiff or actual dispossession by the Defendants within the statutable period. RAJCOOMAR ROY *v.* GOBIND CHUNDER ROY 140

2. —— Unless the amount recoverable under a bond is made a charge upon immoveable estate, a suit in respect of it is barred in six years.—Where the personal liability of the Defendant might and ought to have been claimed against him in a former suit brought by the same Plaintiff on the bond to enforce such alleged charge:—*Held*, that a new suit for that purpose is barred, as *res judicata* under sect. 13 of the Code of Civil Procedure. KAMESWAR PERSHAD *v.* RAJKUMARI RUTTUN KOER - - - - - 234

MAHOMEDAN LAW.] According to Mahomedan law there can be no valid wakfnama without a substantial dedication of property to religious or charitable uses at some time or other.—*Sheik Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (Law Rep. 17 Ind. Ap. 28) followed.—Where the legal heirs of the settlor were the only objects of his bounty, and no possession was given in the lifetime of the settlor, the intention being to make the settled estate devolve from one generation of his descendants to another without its being alienable by them or liable to be taken in execution for their debts:—*Held*, that the transaction was invalid either as a

MAHOMEDAN LAW—*continued.*

settlement, or, if made with consent of heirs, as a will. ABDUL GAFUR *v.* NIZAMUDIN - 170

MORTGAGE: *See* HINDU WIDOW.

MORTGAGE OF ALL THE BANKRUPT'S ASSETS: *See* BANKRUPTCY.

MORTGAGEE'S BURDEN OF PROOF: *See* HINDU WIDOW.

NAWAB NAZIM'S DEBTS ACT, 1873.] In a suit against the Government to recover an annuity with arrears, on the ground that the Government held property of the late Nawab Nazim on which the annuity was charged:—*Held*, that, according to the true construction of the *Nawab Nazim's Debts Act*, 1873, an award of the Commissioners thereunder to the effect that the property in suit was free from the said charge was binding and conclusive:—*Held*, further, that no charge had been created, the documents relied upon not disclosing an intention so to do. OMRAO BEGUM *v.* SECRETARY OF STATE FOR INDIA - - - - 95

ONUS PROBANDI:

See EXECUTION OF BOND BY HINDU WIDOW.
PRINCIPAL AND AGENT.
REVOCATION OF WILL.

PLEDGOR AND PLEDGEE.] *Held*, that a sale by a pledgee to himself of securities pledged is void; but it does not put an end to the pledge, so as to entitle the pledgor to recover them without payment of the amount thereby secured; nor does it entitle him to damages:—*Held*, further, that the pledgor is bound by re-sales duly effected by the pledgee to third persons after such abortive sales to himself:—But *held*, that where the pledgee has erroneously represented to the pledgor before such re-sales that his securities have been sold, they can no longer be regarded as pledged, and he becomes on such re-sales liable for the value thereof as for a conversion. NEIKRAM DOBAY *v.* BANK OF BENGAL [60

PRACTICE.] Where the Subordinate Judge finds that there has not been such an amount of search for an original document as to justify the Court in admitting a copy:—*Held*, that this is a point proper to be decided by the Judge of First Instance, and depending very much on his discretion, and that his decision should not be overruled except in a very clear case of miscarriage. SRIMATI RANI HURRIPRIA *v.* RUKMINI DEBI - - - - - - - 79

2. —— Where a purchaser at a sale in execution alleges that he has been induced by fraud to pay a larger price for his purchase than he otherwise would have done, his remedy is not under sects. 311 to 313 of the Code of Civil Procedure; and the Judge must confirm the sale. A summary order to set it aside may be reviewed under sect. 622. BRIJ MOHUN THAKOOR *v.* RAI UMA NATH CHOWDHRY - - 154

3. —— Sect. 244 of the Civil Procedure Code bars a fresh suit in relation to the execution, discharge, or satisfaction of a decree. It does so in terms when the question has arisen between the parties to the suit in which the decree was passed; and it has been rightly held to apply when the question raised concerns the auction purchaser at an execution sale as well as the parties. PROSUNNO COOMAR SANYAL *v.* KASI DAS SANYAL - - - - - 166

4. —— Where Plaintiff's title to sue was treated in the Courts below as dependent upon the issue whether her deceased husband and the Defendant's deceased husband (sons of the same father) were sapindas of each other; and the Courts found that the Plaintiff's husband was illegitimate, and, therefore, not a sapinda of his brother, and on that ground dismissed the suit:—*Held*, that assuming the Plaintiff to be entitled to avail herself of a finding by the High Court in another suit that the Defendant's husband was also illegitimate, she could not be allowed to raise in appeal the contention totally different from those which were heard and determined in the Courts below—viz., that two brothers can inherit from one another because they are equal in point of illegitimacy. *Sreemutty Dossee* v. *Ranee Lalunmonee* (12 Moo. Ind. Ap. 470) followed. GAJAPATI RADIKA *v.* VASUDEVA SANTA SINGARO - - - - - 179

5. —— Although a third Court cannot entertain an appeal under sect. 584 of the Code of Civil Procedure upon any question as to the soundness of findings of fact by a second Court; it can, nevertheless, adjudicate as matter of law upon the soundness of the conclusions which have been derived from those findings.—Where the third Court held that the evidence did not justify the second Court's conclusion that the Defendant was bound by a mortgage executed by his mother: *held*, that the judgment was substantially one of law, and was capable of being affirmed without interfering with the findings of fact of the lower appellate Court. RAM GOPAL *v.* SHAMSKHATON [228

PRESUMPTION OF POSSESSION: *See* LIMITATION. 1.

PRINCIPAL AND AGENT.] Where a landowner's agent sued to recover arrears of rent, and afterwards, on objection taken to his authority, obtained an order of Court amending the plaint by substituting the name of his principal:—*Held*, that on failure to prove his authority to sue, the suit was rightly dismissed, and that the order amending the plaint was not a decision as to the authority in question. NAM NARAIN SINGH *v.* ROGHUNATH SAHAI - - - - 135

2. —— Where an account has been directed of such moneys as the Defendants' manager, found to have been imprudent and dishonest, would have been justified in borrowing in the course of a prudent management of his estate, *held*, that the *onus* is on the creditor to shew that each advance is within the above terms, and is not discharged by proof that the money borrowed was partly used in payment of Government revenue without proof that the rents were insufficient for that purpose. RAJAH PARTAB BAHADUR SINGH *v.* RAJAH CHITPAL SINGH - - 33

PROMISSORY NOTE.] An indorser of a promissory note who pays the holder of it is entitled to the benefit of the securities given by the maker of it which the holder has in his hands at the time of the payment, and upon which he has no claim except for the note itself.—*Duncan, Fox & Co.* v. *North and South Wales Bank* (6 App. Cas. 1) followed:—*Held*, further, on the evidence in this case, that the owner of the securities had authorized their transfer by the holder to the Appellant on receiving payment. AGA AHMED ISPAHANY *v.* JUDITH EMMA CRISP - - 24

PRIVITY OF CONTRACT: *See* LESSOR AND LESSEE.

PURCHASER OF A TITLE BY ESTOPPEL NOT AFFECTED BY NOTICE; *See* ESTOPPEL. 1.

REGULATION VIII. OF 1819, s. 8, clauses 2 and 3.] It is a condition precedent to a valid sale under Regulation VIII. of 1819 for six months' arrears of rent that the notice of sale should follow strictly the terms of clause 3 of sect. 8, and so intimate to the debtor not merely the balance due but that payment of three-fourths thereof will prevent a sale. If the notice follows instead the terms of clause 2, and intimate that the whole arrear must be paid, it is essentially defective, and the sale must be set aside.—Although the objection was not taken in the lower Court, yet appearing on the face of the notice, and being fatal to the proceeding, it was competently taken in appeal before the High Court. *Olpherts and Macnaghten* v. *Mahabir Pershad Singh and Another* (Law Rep. 10 Ind. Ap. 25) distinguished. NAWAB KHAJA AHSANULLA KHAN BAHADOOR *v.* HURRI CHURN MOZOOMDAR - - - 191

REMEDY FOR FRAUD OF PURCHASER AT A SALE IN EXECUTION: *See* PRACTICE. 2.

RENEWAL BY GUARDIAN OF INFANT LESSEE FOR HER OWN BENEFIT: *See* LESSOR AND LESSEE.

RES JUDICATA.] Where a decree for possession of lands in suit has been made, the plaint describing such lands by general boundaries not sufficiently detailed to admit of exact identification, the execution proceedings under which possession has been given not defining them with any greater certainty, the possession actually taken having been of lands demarcated shortly after possession was delivered, it did not appear

RES JUDICATA—*continued.*

by whom, but in a manner subsequently approved by the revenue authorities:—*Held*, in an action by Government to eject the decree-holders, that the lands so demarcated must be accepted as covered by the decree, and that the action was barred as *res judicata*. SECRETARY OF STATE FOR INDIA *v.* DURJIBHOY SINGH - - - 69

—— *See* LIMITATION. 2.

REVOCATION OF WILL.] A duly-executed will is not to be treated as revoked, either wholly or partially, by a will which is not forthcoming, unless it is proved that the later will contained a revocation expressed or necessarily implied, the burden of proof to that effect being on the person who challenges the earlier will.—Payment of certain legacies being resisted on the ground that the testatrix had no disposing power over the fund out of which she directed them to be paid:—*Held*, that, on a consideration of the whole will, the clause in question could not be restricted to such fund, but extended to the whole moveable estate of the testatrix. Otherwise the legacies were demonstrative, and on failure of the particular fund named were payable out of the general estate. NAWAB SAHIB MIRZA *v.* MUSSAMMAT UMDA KHANAM - - - - 83

RIGHT TO FERRY: *See* LAND TENURE.

RIGHTS UNDER AN IKRAR OF PERSONS NOT PARTIES THERETO: *See* HINDU LAW. 3.

SALE FOR ARREARS OF RENT SET ASIDE: *See* REG. VIII. OF 1819.

SECOND APPEAL AS TO LEGAL INFERENCE FROM FACTS AS FOUND: *See* PRACTICE. 5.

SECONDARY EVIDENCE: *See* PRACTICE. 1.

SHEBAITS: *See* HINDU LAW. 2.

SIMULTANEOUS ADOPTION: *See* HINDU LAW. 3.

TRANSFER OF PROPERTY ACT, 1882, s. 43: *See* ESTOPPEL.

WAKF ESTATE MUST BE DEDICATED TO CHARITY: *See* MAHOMEDAN LAW.

WIDOW'S POWER OF ALIENATION: *See* HINDU LAW. 4.

WILLS: *See* HINDU LAW. 2 and 3.
REVOCATION OF WILL.

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